

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2006

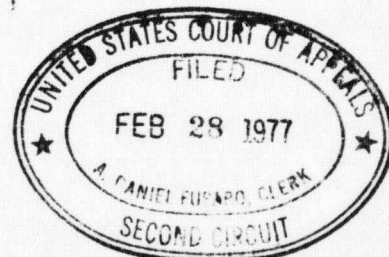
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
THOMAS LIPUMA, :
 :
Petitioner-Appellee, :
 :
-against- :
 :
COMMISSIONER, Department of Corrections, :
State of New York, et al., :
 :
Respondents-Appellants. :
-----X

APPENDIX

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents-
Appellants
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4178

RALPH L. McMURRY
Assistant Attorney General
of Counsel



PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	<u>PAGE</u>
Docket Entries.....	A1
District Court Opinion of September 24, 1976.....	A4
District Court Opinion of October 19, 1976.....	A33
Habeas Hearing Minutes of April 14, 1976.....	A38

208-1	75	3175	06	30	75	3	530	1				0861	75	31
-------	----	------	----	----	----	---	-----	---	--	--	--	------	----	----

PLAINTIFFS

UNITED STATES ex rel. NANCY
ROSNER, on behalf of THOMAS
LI PUMA,

DEFENDANTS CONNER,

COMMISSIONER NEW YORK STATE
DEPARTMENT OF CORRECTION:
WARDEN, NEW YORK STATE
CORRECTIONAL FACILITY,
OSSINING, NEW YORK.

HABEAS CORPUS
28 U. S. C. § 2254

CAUSE

e.v.

ATTORNEYS

Rosner, Fisher and Scribner,
401 Broadway
New York, New York 10013
(212) 925-8844

JUDGE CONNER

☐ CHECK
HERE
IF CASE WAS
FILED IN
FORMA
PAUPERIS

FILING FEES PAID

DATE
JUN 30 1975

RECEIPT NUMBER

54004

C.D. NUMBER

STATISTICAL C

CARD
JS-5
JS-6

A1

DATE M

DI

DATE	NR.	PROCEEDINGS	CONNER, J.
		(PG #2)	
6-30-75	1	Filed Petition for Writ of Habeas Corpus.	
6-30-75	2	Filed Petitioner's Memorandum and Facts of Law.	
1-28-75	(3)	Filed respondents' affdvt. of Rhonda Amkraut Mayer in opposition to application for a writ of habeas corpus.	
1-28-75	(4)	Filed memorandum of law in opposition to petitioner's application for a writ of habeas corpus.	
1-1-76	(5)	Filed order that counsel shall appear to adduce evidence bearing upon as indicated, and Counsel will be contacted in due course to arrange a mutually convenient time for the hearing. So ordered. Conner, J. m/n	
13-30-76	(6)	Filed affdvt. of Nancy Rosner in support of W/H/C Ad. Test.-Ret. 4-13-76	
05-05-76	(7)	Filed respondents' post-hearing memorandum in opposition to application for a writ of habeas corpus.	
06-02-76	(8)	Filed petitioner's post hearing memorandum in support of the issuance of the writ of habeas corpus.	
6-02-76	--	Filed transcript of record of proceedings dated 4-14-76	
07-09-76	(9)	Filed writ of habeas corpus ad testificandum for Thomas Li Puma - with marshal's return - writ satisfied 6-4-76	
1-23-76	(10)	Filed memorandum and order #45138 Petitioner Thomas LiPuma, currently serving a five year-maximum term***this Court has already observed, had LiPuma prevailed on the motion, the remaining prosecution evidence would not have been of sufficient weight to have foreclosed the possibility of LiPuma's acquittal..The judgment of conviction accordingly must be VACATED.***to afford petitioner a new trial.... CONNER, J.....Mailed notice...	
10-1-76	(11)	Filed respondents notice of motion for an XXXX alteration or amendment of judgment dtd.9-24-76...	
10-1-76	(12)	Filed respondents memorandum in support of above motion.	
10-07-76	(13)	Filed petitioner's reply memorandum.	
10-08-76	(14)	Filed Order-that the petitioner, Thomas Li Puma, shall be admitted to bail in the am't of \$10,000.00 surety bond, to be posted with the Supreme Court of the State of N.Y., County of N.Y...CONNER, J (m/r	
10-19-76	(15)	Filed Memorandum and Order.....for the reasons stated Petitioner is directed to submit a proposed order amending this Court's September 24, 1976 Order as indicated above. Respondent's motion is otherwise denied. So Ordered. CONNER, J m-n	
2-17-76	(16)	Filed Order--that this Court's order of 9-24-76 be amended to read that the writ of habeas corpus shall issue unless with sixty(60) days from the date of service of the amended order the state affords petitioner the opportunity to make a motion to suppress certain evidence and if said motion is successful for further proceedings in accord with this Court's Memorandum and Order dated 10-19-76. So ordered- CONNER, J. (m/n)	
1-14-77	(17)	Filed respondents notice of appeal to USCA from the judgment and order dated 12-17-76. Copy to Nancy Rosner. Ent. 1-14-77	
1-21-77	(18)	Filed Respondents Affidavit in support of their application for a stay pending appeal of this court's order and judgment of 12-17-76. by Ralph L. McMurry	
1-28-77	--	Filed memo endorsed on paper #18..Motion Granted...Conner, J..m/n	

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF

UNITED STATES ex rel NANCY ROSNER, on
behalf of Thomas LiPuma

DEFENDANT

COMMISSIONER, NEW YORK STATE DEPT.
OF CORRECTION, etc.DOCKET NO. 75-3175PAGE 3 OF 3 PAGES

(CONNER, J.)

DATE

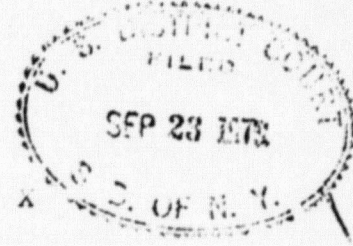
NR.

PROCEEDINGS

02-14-77

Filed notice that the record on appeal has been certified and transmitted to
the USCA this day.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
UNITED STATES ex rel. NANCY ROSNER,
on behalf of THOMAS LI PUMA,

Petitioner,

:
:
: 75 Civ. 3175
: (WCC)

- against -

COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTION; WARDEN, NEW YORK STATE
CORRECTIONAL FACILITY, OSSINING, NEW YORK,

:
: MEMORANDUM
: AND ORDER

Respondents.
----- -X

: 45138

A P P E A R A N C E S :

NANCY ROSNER, ESQ.
Attorney for Petitioner
401 Broadway
New York, New York 10013

HONORABLE LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York
Attorney for Respondents
Two World Trade Center
New York, New York 10047

RHONDA AMKRAUT BAYER, ESQ.,
Assistant Attorney General,
Of Counsel

CONNER, D. J.:

Petitioner Thomas LiPuma, currently serving a five-year-maximum term of imprisonment pursuant to a judgment rendered in Supreme Court, New York County, on June 24, 1974, was convicted of second degree burglary and petit larceny after trial to a jury. Having unsuccessfully appealed that judgment to the New York Appellate Division and Court of Appeals, petitioner now collaterally challenges his conviction under 28 U.S.C. § 2254.

Petitioner has launched a three-pronged assault against the state judgment, claiming that (1) he was so inadequately represented by retained defense counsel that he was denied protections rightfully his under the Sixth and Fourteenth Amendments; (2) the trial court's refusal to declare a mistrial, despite the admission of inculpatory evidence relevant solely to indictment counts that were ultimately dismissed, constituted a denial of petitioner's due process rights; (3) the prosecutor's summation was so inflammatory and otherwise improper that it effectively vitiated the Constitution's fair trial guarantees.

Reference to petitioner's appellate submissions discloses that the state courts have had a fair opportunity to pass upon the three contentions advanced by petitioner herein. This Court is thus satisfied that petitioner has exhausted his state

remedies in accordance with 28 U.S.C. § 2254(b) and (c).^{1/}
Picard v. Connor, 404 U.S. 270, 276 (1971); Ralls v. Manson,
503 F.2d 491, 493 (2d Cir. 1974). See United States ex rel.
Gibbs v. Zelker, 496 F.2d 991, 993-94 (2d Cir. 1974); United
States ex rel. Nelson v. Zelker, 465 F.2d 1121, 1123-25 (2d
Cir.), cert. denied, 409 U.S. 1045 (1972). The merits of
petitioner's present claims may best be measured against the
historical background -- partially reflected in the state court
trial transcript and supplemented via an evidentiary hearing
held by this Court -- traced in relevant portions as follows.

I.

On the evening of January 10, 1972, Mr. and Mrs. William Robinson, returning to their suite in the Berkshire Hotel, discovered that various items -- including a leopard-skin coat and a mink jacket -- had been taken from their rooms during their absence. Minutes before, Mr. and Mrs. Raymond Geibel, the elderly occupants of rooms on the floor above, had returned to their own suite from an evening's stroll only to encounter a situation no less disconcerting: an intruder -- entirely unknown to them -- sitting at the desk in their front room. Asked by Mrs. Geibel to explain his presence, the stranger announced that he was a hotel security officer investigating several reported burglaries at the Berkshire. Thereupon, two additional men appeared from the Geibels' bedroom and hurriedly corroborated the explanation proffered by the first. Mr. Geibel,

then recuperating from recent brain surgery, summoned enough wit to demand from the three credentials of their purported capacity. Hastily assuring Mr. Geibel that they would return with the proof demanded, the three strangers just as hastily exited from the couple's suite. In the hope of drawing from the men some further information or reassurance, Mr. Geibel accompanied the three down the hall and remained with them until arrival of the elevator. Thereafter, taking stock of their rooms and their property, the Geibels unhappily noted the presence of a state of disarray and the absence of a small pill box, approximately five dollars in value, from a bedroom dressing table.

The incidents described above were quickly reported by the victims. Within minutes of those reports, the police had arrived at the Berkshire, had sealed the hotel's front doors, and had interviewed the Robinsons and the Geibels. From the former, the police obtained a list of the items that had presumably been stolen; from the latter, the police elicited a description of three suspects, two reportedly "latin types," the third of "lighter skin." After a general search of the hotel's hallways and stairwells, the police consulted the Berkshire records. The register disclosed that Suites 612 and 613 were occupied by new registrants. Three police officers were assigned to investigate those suites. What the officers discovered in Suite 613 is largely a matter of no dispute. The

manner in which that discovery was accomplished, however, is a question that lies at the heart of the present petition.

II.

One James Doyle, under an assumed name, had checked into the Berkshire, and was assigned Suite 613, sometime during the early evening of January 10, 1972. And it was Doyle whom the police first encountered at the threshold of the suite later that evening. The officers encountered petitioner as well in Suite 613, but rather more indirectly: at the time of discovery, petitioner was crouched inside a bedroom closet, joined in that posture by one Peter Raimondo. Also found inside the suite were a leopard-skin coat, a mink jacket, and a small pill box, the last harbored in one of Raimondo's pockets.

Petitioner and his two companions were placed under arrest and brought to the local precinct stationhouse. Within two hours of the hotel burglaries, the three were separately placed in line-ups and viewed by the Geibels. Mr. Geibel was unable to identify any of the three. Mrs. Geibel identified petitioner alone as having been among the three strangers whom she had confronted earlier in the evening. At LiPuma's trial some two-and-one-half years later, Mrs. Geibel would testify that petitioner had been the man at the desk whom she had initially encountered upon her return to her Berkshire suite on January 10, 1972.

III.

On March 7, 1972, LiPuma, Doyle, and Raimondo were arraigned on an indictment that charged each with two counts of second degree burglary, petit and grand larcenies, and two counts of criminal possession of stolen property. At the time of arraignment, petitioner was nominally represented by Lawrence Hochheiser, Esq., retained counsel for Doyle. Two months thereafter, petitioner retained Michael Coiro, Esq., as his individual counsel, an engagement reflected in a formal substitution for Hochheiser recorded on May 14 or 16, 1972. Coiro and his partner, Salvatore Quagliata, Esq., were to represent LiPuma as co-counsel via a division of labors, the former to act as courtroom counsel, the latter to attend to paper submissions on motion practice in the case.

During independent consultations with their respective attorneys, both Doyle and LiPuma maintained that the police had entered Suite 613 of the Berkshire without the lawful occupants' consent. Each recounted that, prior to the policemen's entry, he had heard a commotion in the outside hall and the sound of a neighboring door being broken down. Each recalled a knock at the door of Suite 613, the policemen's announcement of their presence, and LiPuma's flight, with Raimondo, to the bedroom closet. Doyle, according to Hochheiser's later account, "spoke of master keys being used and policemen

forcing their way in with guns." Both Doyle and LiPuma recalled that the Robinson furs had been discovered by the police only after a search of the suite.

On April 5, 1972, i.e., before LiPuma's individual counsel had been retained, Hochheiser had filed on Doyle's behalf a motion to suppress all evidence derived from the search and seizure of January 10, 1972. On May 16, 1972, Quagliata, appearing on LiPuma's behalf before Supreme Court Justice Leff, took part in the following colloquy:

"Mr. Quagliata: The defendant came to [my] office last night. We went through the facts briefly. * * *. Now, from the little information that we have, without getting a copy of all the papers, it would appear that there are some motions that lie. In order to expedite the matter, I would ask the Court for an adjournment sufficiently long enough so that I could collect all the information, get whatever witnesses are necessary should there be any witnesses and file any motion papers. * * *. I would file motion papers as soon as it is practicable, as soon as I can find if a motion lies."

"The Court: We have adjourned this case to May 30th [1972], and if you have to make any motions, make them in ample time so that the papers will be back here before then."

After fuller discussion with their client, and a pooling of information with Hochheiser, co-counsel for LiPuma jointly concluded -- as had Hochheiser -- that the facts, at least according to their client, supplied the stuff of which a meritorious suppression motion is made: the events preceding the police entry of Suite 613 did not, after all, bespeak the probable

cause or exigency of circumstances that would otherwise have justified a warrantless search without consent. In July or August 1972, LiPuma was advised by Coiro and Quagliata that a motion to suppress had been filed on his behalf.

At some time between the summer of 1972 and the spring of 1973, a private investigator was hired at the joint expense of LiPuma and his co-defendants. The investigator reported to counsel the results of his interview with a hotel clerk employed at the Berkshire during the time of the occurrences in question: the clerk disclosed that the door adjacent to Suite 613 had been damaged on the evening of January 10, 1972, and that, at some point during that evening, he had supplied the police with a master key.

IV.

On May 3, 1973, James Doyle pleaded guilty to one count of second degree burglary. Doyle's counsel had advised the plea in the light of a federal indictment that had been pending against his client. Hochheiser later explained:

"[Doyle's] public defender [on the federal charge] had negotiated a plea for that case * * * and arranged for an 8-year sentence in that case.

I had discussed that situation with Judge George Roberts, who was an acting Supreme Court Judge in the State of New York at that time, and Judge Roberts had told me that if Doyle got substantial time in the federal [case], and not merely nominal time, that he would accept a plea

of guilty under which he would sentence Doyle to concurrent time which * * * would satisfy me that Doyle wouldn't wind up doing a million years.

* * * * [S]ince my understanding at that time was that Doyle would in effect do this time at the same time he would do the federal time and would do it in a federal institution, which was better time than a state institution, it is more civilized and easier to do, that it seemed to me that there was no purpose in pursuing this case any more."

Hochheiser described as well what he characterized as a "secondary" consideration in his client's decision to plead guilty. At some point prior to May 3, 1973, Hochheiser had interviewed one or more of the police officers who had participated in the January 20, 1972 search and seizure in Suite 613. According to the account given by the officer or officers, James Doyle -- in an attempted bluff -- had permitted the policemen access to his rooms and, indeed, had invited them to "come in and look around"; once inside the suite, the officers had spied, in plain view atop a bed, an open suitcase from which overflowed a mink jacket and a leopard-skin coat. Again according to the recital by the policeman or policemen, Doyle's furtive glances toward the bedroom closet quickly led the police to their discovery of LiPuma and Raimondo.

Hochheiser later recalled his reaction to the above-outlined interview:

"After they told me what in effect they would be testifying to, I realized that, A, if their testimony was true and believed that they would probably win; or, B, if their testimony was false that they were pretty clever policemen and knew the law well enough to lie effectively enough to beat Doyle, who had an extensive criminal record."

To these last observations, however, Hochheiser added:

"[W]ithout the Connecticut situation I would not have come to [the] conclusion [that the suppression motion was ill-fated]. Without the Connecticut situation I would have said that this may be tough but I am going to do it * * * . [I]f I didn't have the Connecticut case to use as an umbrella, so to speak, I would have proceeded."

Conceding that "there is some benefit to taking a motion to suppress and then taking a plea," Hochheiser explained why he had not taken that course:

"[T]he practical answer is prosecutors don't let you do it. If you want the plea, you give up the motion generally. It is not universal but generally. I can tell you that this particular prosecutor who took over the case, Mr. Kreidman, was not the most liberal Assistant District Attorney in that office, and I can tell you most certainly that there was no possibility of having that motion heard and then getting the plea that I thought I worked out."

While the state indictment was still pending against Doyle, Hochheiser briefed Quagliata on the substance of the statement(s) elicited from the police officer(s). Quagliata, like Hochheiser, realized that "there would be a problem in

proving the motion to suppress." Nevertheless, armed with the defendants' version of the events in Suite 613, a version reinforced in some of its aspects by the statement of the Berkshire Hotel clerk, Quagliata was determined to press the motion on LiPuma's behalf. After all, a suppression motion was, in Quagliata's view, crucial to LiPuma's defense: it would constitute a challenge to evidence upon which no fewer than three of the six indictment counts were predicated and upon which the remaining counts in substantial part rested.

V.

Thomas LiPuma was brought to trial on May 2, 1974. On the preceding day, a Wade-Stovall hearing had been held on defendant's challenge to Mrs. Geibel's January 10, 1972 line-up identification of LiPuma. Justice Fraiman, the Judge presiding both at the pre-trial motion hearing and the trial to follow, ruled the out-of-court identification admissible. At trial, the prosecution witnesses included, inter alia, Mrs. Geibel and Officers Donnelly, Powers, and Green, the policemen who had searched Suite 613 and seized LiPuma, his two companions, and the items allegedly stolen from the Robinsons and the Geibels.

On the witness stand, Mrs. Geibel recounted her verbal exchange with the "man sitting at the desk," whom she

identified in court as the defendant. In testifying with respect to the events immediately thereafter, Mrs. Geibel recalled that, after her momentary exchange with the first stranger, "I wasn't watching anybody. I was watching the whole scene, I guess." In retracing the details of her line-up identification of LiPuma, Mrs. Geibel conceded during cross-examination that she had recognized one or more police officers among the five men placed in line with LiPuma.

Officer Donnelly was the first of the three policemen involved in the search and seizure to be called to the stand. Donnelly rehearsed the events of January 20, 1972, from his assignment to investigate the two sixth-floor suites, through the search and seizure that followed, to the ultimate station-house proceedings.

The next witness, Officer Powers, described in some detail the circumstances of his entry, with Officers Donnelly and Green, into the suite occupied by LiPuma and his companions on the evening in question. The following reproduces a portion of Powers' testimony on direct examination:

"Q. Tell us what happened when you got to room 613, sir.

A. Patrolman Donnelly knocked on the door.
A voice answered, 'Yes.'

Patrolman Donnelly said, 'We're New York City police. We'd like to speak to you.'

And there was a silence, and then, 'What's it all about?' I think were some of the words used, and one of us mentioned that we wanted to

make sure that you were all right, there had been trouble in the building and we would like to make sure that you were all right.

After a brief moment, the door opened, a man stood there in boxer shorts. Patrolman Donnelly engaged him in a conversation.

I went past the man. I went to the end of the room which[sic] the window was open. There were drapes. I looked behind the left drape."

The cross-examination of Powers elicited the following testimony:

" Q. [Y]our testimony was, correct me if I am wrong, sir, that 'I walked past him into the apartment to the open window.'?

A. That's right.

Q. In other words, you just pushed your way into that apartment?

A. No, I'm sorry, I didn't push my way in.

Q. Not that you physically pushed somebody, but the door was open and you stepped right through the apartment -- right through the doorway into the apartment?

A. That's correct."

Recross-examination of Powers was punctuated by the following questions from the Court and the following responses by the witness:

"THE COURT: Excuse me. Exactly what transpired when, as he opened the door, did he say something to you when he opened the door, or did you say something to him as soon as he opened the door?

THE WITNESS: When he opened the door, I can't recall the exact words.

THE COURT: In substance.

THE WITNESS: Patrolman Donnelly engaged in conversation. It went something like, 'Are you all right, mister? Anybody in here that's not supposed to be?' Or something to that effect. We had been looking for people in the building that had committed a crime.

THE COURT: What did he say in response to your -- Patrolman Donnelly?

THE WITNESS: He said something that he was sleeping.

THE COURT: And what did you do during this time?

THE WITNESS: I went right past the two of them."^{2/}

VI.

Sometime during the morning of the second day of trial, defense counsel Coiro, addressing Justice Fraiman apparently off the record, had broached the subject of a motion to suppress; Coiro had subsequently interrupted his cross-examination of Officer Donnelly to supply the Judge with a case citation in support of defendant's standing to make such a motion. That afternoon, when the testimony of Officer Powers was completed, Coiro and the Court engaged in the following colloquy:

"MR. COIRO: Might I take the liberty of asking Your Honor as to my request for a motion to suppress?

* * * *

THE COURT: If it isn't on formal papers, I certainly want a little more than your saying "motion to suppress" and saying "Jones against

the United States" and then expecting me to rule on your motion.

MR. COIRO: Judge, I think I might be able to clear that up on Monday. I'll have my associate here because he tells me, Judge, and I don't want to say anything to the Court that isn't exactly so, that one of his appearances, I think before Judge Leff, I think it is, Your Honor, I'm not sure of the name, when [Assistant District Attorney] Andrews was handling the case that, at that time, on the record, that they consented to -- the People consented to a motion to suppress.

THE COURT: What happened to it?

* * * *

I asked Mr. Coiro whether there were any motions pending when the case came in this part and he said there was only one motion and that was for a Wade hearing.

Is that correct, Mr. Coiro?

MR. COIRO: That's absolutely correct, Your Honor."

VII.

"What happened" to LiPuma's suppression motion after Quagliata's May 16, 1972 appearance before Justice Leff until the May 2, 1974 commencement of LiPuma's trial remains to date a matter of some mystery. In an attempt to reconstruct the events that might provide an answer to that question, Quagliata would later rather vaguely recall that he had, at some point during the two-year period, joined in Hochheiser's motion either on the record or off the record with the consent of the Assistant District Attorney then in charge of the case against LiPuma and

his co-defendants. But neither the state court stenographic transcripts nor the former prosecutor's best recollection would confirm Quagliata's memory. Nor, for that matter, does it appear that either Quagliata or Coiro had, with respect to the suppression motion, ventured by personal inquiry beyond the intelligence garnered from the defendants' private investigator, Hochheiser, or the co-defendants themselves during the two years preceding LiPuma's trial. What is clear enough, however, is co-counsel's failure to press a hearing on the motion prior to trial.

Coiro, for his part, would later recall that

"I am a pretty busy trial lawyer, on trial most of the time. I had forgotten what Mr. Quagliata had told me, that he joined in the motion orally before one of the judges."

By the time of LiPuma's trial, Coiro had in fact forgotten the suppression motion entirely; in advance of trial, he had consulted his case file, but it had not reflected the pendency of such a motion.

VIII.

Having participated in lengthy and frequent sidebar discussions with counsel during the preceding days, Justice Fraiman finally resolved on May 8, 1974 that defendant's motion to suppress -- which he himself had earlier characterized as

a matter "go[ing] to the heart of the People's case" -- could not be considered mid-trial. The Court was bound to deny a hearing on the motion, Justice Fraiman concluded, by the terms of Section 710.40 of the New York Criminal Procedure Law. The statute at that time provided in relevant part:

"1. A motion to suppress evidence must be made * * * with reasonable diligence prior to trial.

2. The motion may be made for the first time during trial when, owing to previous unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion before trial * * * ."

Justice Fraiman determined that Section 710.40 did not comprehend the circumstances before him and that it thus would not accommodate a hearing on the proposed motion, raised as the latter was after trial had begun. An embarrassed Quagliata and a discomfited Coiro were hardly able to suggest otherwise. For Thomas LiPuma, defense counsel's remembrance had come too late.

IX.

In view of the narrative ground traversed above, the second and third claims raised by the instant petition need not detain us long. Petitioner has argued that the admission of

evidence with respect to items allegedly stolen from the Robinsons and found in the rooms occupied by him -- evidence presented in connection with indictment counts ultimately dismissed -- so prejudiced his defense on the remaining counts that due process was denied by the trial court's refusal to declare a mistrial; according to petitioner, due process was not salvaged by the trial court's curative instructions following its dismissal of all counts involving the Robinson burglary. Petitioner has further argued that the prosecutor's summation was so-larded with outrageously improper remarks that defendant LiPuma was in consequence denied his right to a fair trial. Neither of these contentions, however, is adequately supported by the trial court record.

It is true enough, as petitioner has noted, that, although it is

"the general rule that striking evidence erroneously admitted ordinarily cures the error, * * * ' * * there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error'." United States v. Parks, 411 F.2d 1171, 1172-73 (1st Cir. 1969), quoting Throckmorton v. Holt, 180 U.S. 552, 567 (1901).

Nevertheless, it is equally true that the accused admissions in the instant case were scarcely matters that a jury might not

reasonably have been expected to purge from its collective mind. What is even more to the present point, however, is the inevitable conclusion that petitioner's defense was doomed by overwhelming evidence wholly apart from that addressed to the Robinson burglary; petitioner thus can hardly be heard to claim as a result of the latter admissions a prejudice of constitutional dimensions.

The above observation is similarly fatal to petitioner's further argument. The trial court record discloses that the accused commentary by the prosecutor -- some twelve remarks that included, inter alia, references to an "impossible defense" and an "overwhelming" prosecution case, the characterization of defense witness Doyle as a "congenital liar," a suggestion of fabrications by defense counsel, an allusion to defense counsel's representation of a "criminal" and an entreaty to the jury to convict "in the name of the People of the State of New York, in behalf of Helen Geibel and some pretty great cops" -- was, to be sure and at the least, a compendium of rhetorical transgressions. Nonetheless, these ill-conceived flourishes of oratory must be viewed "in the context of the entire trial." United States v. White, 486 F.2d 204, 207 (2d Cir. 1973). The defense was essentially devoted -- principally via Doyle's rather muddled testimony -- to the proposition that Doyle and Raimondo alone had committed the Geibel burglary, i.e., that Mrs. Geibel had seen not three,

but two burglars, and that LiPuma had been the unhappy victim of perverse circumstance. In the light of the prosecution evidence that had preceded it, such defense was an efficient engine of its own undoing. Thus, in such a posture, the LiPuma defense could not have suffered a constitutionally proscribed impairment by force of the prosecution summation that impugned it.

X.

We return from the above analytic detour to the central avenue of our inquiry -- i.e., petitioner's charge of ineffective assistance of counsel. This Court begins that inquiry wholly mindful, as it must be, that such claims stand in the shadow of a history of notably rare success, particularly in this Circuit. Compare, e.g., United States ex rel. Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); Massimo v. United States, 463 F.2d 1171 (2d Cir. 1972); United States ex rel. Marcellin v. Mancusi, 462 F.2d 36 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); United States v. Matalon, 445 F.2d 1215 (2d Cir.), cert. denied, 404 U.S. 853 (1971); United States ex rel. Scott v. Mancusi, 429 F.2d 104 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971), with Mosher v. LaVallee, 491 F.2d 1346 (2d Cir. 1974); United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971). Understandably enough, the standard against which an inadequacy-of-counsel claim must be

measured is an extremely rigorous one. After all, in the sights of a convicted defendant, the judgment against him may well stand as incontrovertible proof that his counsel was "inadequate" to his case. A consequent habeas corpus petition may thus constitute no more than a misguided vehicle for a defendant who

"freely equates lack of success in his criminal defense with counsel incompetency, and illogically and irrationally blames his predicament, which is primarily of his own doing, upon the inability of counsel to extricate him." Slawek v. United States, 413 F.2d 957, 958 (8th Cir. 1969).

Thus, to prevail on a claim of constitutionally inadequate representation, a petitioner -- at least in this jurisdiction -- must meet the burden of proving that his counsel's performance was so "woefully inadequate" as to "shock the conscience of the Court and make the [resultant] proceedings a farce and mockery of justice'." United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 (1969), quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). Indeed, only "[i]f counsel's representation is so 'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interests'," will a reviewing court be satisfied that "there has been a lack of compliance with the fundamental fairness essential to due process." United States ex rel. Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967), quoting Kennedy v. United States, 259 F.2d 883, 886 (5th Cir. 1958), cert.

denied, 359 U.S. 994 (1959). That heavy burden will not be borne successfully absent, at the least, a showing that "counsel was both grossly incompetent, and that 'the essence of a substantial defense' was thereby blotted out." United States ex rel. King v. Schubert, 522 F.2d 527, 529 (2d Cir. 1975), cert. denied, U.S. (197), quoting United States ex rel. Testamark v. Vincent, 496 F.2d 641, 643 (2d Cir. 1974), cert. denied, 421 U.S. 951 (1975).

Decisional precedent in this Circuit makes it clear that "'[e]rrorless counsel is not required', * * * and 'tactical errors or mistakes in strategy', * * * even if established, will not suffice to meet the high burden placed on the [petitioner]." United States v. Matalon, supra, at 1218-19, quoting United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963). Moreover, as indicated above, it is a familiar principle that the inadequacy-of-counsel question has invariably as its point of reference "the character of the resultant proceedings." United States v. Wight, supra, at 379; see United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 237 (2d Cir.), cert. denied, 404 U.S. 967 (1971).

This Court concludes that the stringent standard outlined above is satisfied by the sins of counsel's omission that were visited upon petitioner in the state trial court. It must be noted, at the outset, that this Court is by no means impelled to that conclusion by force of the fervent and abject confessionals of counsellors Coiro and Quagliata themselves.

In the legal profession, as elsewhere, it is often the most able and conscientious practitioner who is most readily prompted to contrition for errors real or imagined, substantial or trivial. The degree of self-abasement by counsel himself thus is simply not the constitutional measure of a claimed incompetence. See United States ex rel. Testamark v. Vincent, supra, at 642.

Moreover, in recognizing the magnitude of petitioner's claim herein, this Court need not conclude that petitioner's former counsel were, or are, "horribly inept" in their general practice of the law. It is, after all, an unhappy fact of judicial life that "[l]imitations of time, space and the finite mind apply even to lawyers," United States v. Dardi, 330 F.2d 316, 328 (2d Cir. 1964) -- and, for that matter, to judges as well. Hence, occasional lapses of memory or incidents of oversight may be expected of the competent as well as their less gifted and diligent brothers. It is only when an attorney's forgetfulness or inattention exacts an outrageous cost to his client that the attorney's conduct amounts to a constitutional deprivation. Cf. United States ex rel. Maselli v. Reincke, supra.

Nor does this Court fault petitioner's former counsel for a failure "to make every motion in the book in the hope that one [might] succeed." Harried v. United States, 389 F.2d 281, 286 (D.C. Cir. 1967). As the Supreme Court has had

occasion to note, "[o]ften the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution." Tollett v. Henderson, 411 U.S. 258, 267-68 (1973), as quoted in United States v. Yanishefsky, 500 F.2d 1327, 1332 n.1 (2d Cir. 1974).

The present case, however, is not one in which "there were no circumstances revealed to [defense counsel] by [defendant] or anyone else which [would] indicate[] that an illegal search and seizure had been made by the police." United States ex rel. Boucher v. Reincke, 341 F.2d 977, 981 (2d Cir. 1965). Nor is this a case in which a suppression motion by defendant would have been of obvious futility. See, e.g., United States v. Yanishefsky, supra, at 1057; United States v. Sanchez, 483 F.2d 1052, 1057 (2d Cir. 1973). Rather, the record discloses that Coiro and Quagliata had had sufficient reason to determine -- and, indeed, they had in fact determined -- that a suppression motion by LiPuma would not be foredoomed, i.e., that, on a hearing of such a motion, the People might not have been able to bear its "heavy burden" of proving consent to the search and seizure in Suite 613. People v. Whitehurst, 25 N.Y.2d 389 (1969).

Respondent's reminder that, in the face of an "overwhelming" prosecution case, "there is not too much that the best defense attorney can do," United States v. Katz, 425 F.2d 928, 930 (2d Cir. 1970), is singularly misdirected to the

circumstances presently under consideration. The prosecution's case against LiPuma drew its strength from two mutually reinforcing sources: Mrs. Geibel's testimony, on the one hand, the evidence derived from the search of Suite 613, on the other. To vindicate that case, clearly more than a Wade hearing was needed. Thus, had a suppression motion been pressed to a timely conclusion, and had it been successful, the prosecution's evidence would have pared down to -- at best -- the identification of defendant by an elderly witness whose direct observation of "the stranger sitting at the desk" had lasted no longer than seconds; whose line-up identification of LiPuma had occurred under somewhat suggestive conditions, and whose husband, at the line-up, had been unable to identify LiPuma as "the stranger" whom he had earlier observed during a significantly longer period than had his wife. The "road not taken" in the present case had thus been critical to the LiPuma defense: only the stark picture of LiPuma, crouched inside the Berkshire closet, huddled close to Raimondo and hence to the Geibel pill box, was enough to confirm the otherwise dubious Geibel testimony and to foreordain LiPuma's conviction.

Respondent suggests, however, that the default now in question was no more nor less than a deliberate choice of trial strategy by defense counsel and, as such, one which this Court may not properly second-guess. See, e.g., United States v. Yanishefsky, supra, at 1332; United States ex rel. Walker v.

Henderson, supra, at 1314; United States v. Massimo, supra, at 326; United States v. Matalon, supra, at 1219. But respondent does not identify -- nor does this Court independently divine -- any possible tactical altar at which LiPuma's suppression motion might have wittingly been made a sacrifice. See Simmons v. United States, 390 U.S. 377 (1968). This Court is convinced, rather, that -- as had been clear from the first -- the LiPuma defense had had nothing to lose and possibly everything to gain from a timely motion to suppress. That motion was not in truth abandoned through the considered choice of defense counsel and client; it was, instead, somehow lost to petitioner in the chasm apparently formed by the division of co-counsel's labors.^{3/}

XI.

This Court thus concludes that the charge of ineffective assistance of counsel -- always serious in its implications, but most often unwarranted -- is fully supported by the peculiar facts disclosed by the record at bar. Whether the inadequate state court representation demonstrated in the present case will in turn support a grant of the relief sought by petitioner must depend upon whether counsel's incompetence may be deemed to have been, beyond a reasonable doubt, "harmless" in the end. As this Court has earlier indicated, a suppression motion by LiPuma would have presented the state trial court with what was,

at the least, a close question; it thus cannot be concluded beyond a reasonable doubt that the motion, had it been advanced, would have ultimately failed. And, as this Court has already observed, had LiPuma prevailed on the motion, the remaining prosecution evidence would not have been of sufficient weight to have foreclosed the possibility of LiPuma's acquittal. Hence the reasonable possibility of prejudice to petitioner as the result of his counsel's glaring neglect is clear. The judgment of conviction accordingly must be vacated, and the writ of habeas corpus will be granted unless respondent commences proceedings, within sixty (60) days of the date hereof, to afford petitioner a new trial.

SO ORDERED.

William E. Carner
United States District Judge

Dated: New York, New York
September 24, 1976

FOOTNOTES

1. Respondent's suggestion that petitioner's third and second claims have not been submitted to the state courts in their present constitutional posture is not confirmed by reference to petitioner's brief on appeal. Although the Sixth and Fourteenth Amendments are not mentioned in terms therein, the substance of both claims respecting the essential fairness of the state court trial was clearly placed before the state courts on appeal.
2. Officer Green, whose testimony followed that of Powers, related a significantly different version of the officers' entry into, and search of, Suite 613. Thus, according to Green, Doyle had invited the three policemen to search the suite "for security purposes."
3. Respondent would have this Court conclude that the operation of New York procedural law forecloses petitioner from indirectly reviving his Fourth Amendment claim via his charge of ineffective counsel. Thus, respondent argues, petitioner cannot be heard to complain of the loss of his suppression motion because, under Section 710.40 of the New York Criminal Procedure Law, he had failed -- through his counsel -- to prosecute that motion in timely fashion. To allow petitioner to assert that claim presently, according to respondent, would be to subvert New York policy as reflected in the state statute.

The above argument is mentioned only to demonstrate that it has not been overlooked. It is a curious legal theory indeed that would have a constitutional right irretrievably lost to a criminal defendant by force not of his own knowing and voluntary waiver, but rather, of his counsel's default through neglect -- the very outrage of which petitioner now complains. As for respondent's invocation of a purported New York policy to be vindicated, it is enough to note that via an amendment to Section 710.40 -- effective within months

of petitioner's trial -- New York law would now allow the trial judge, in his discretion, to hear a motion raised under the circumstances reflected in the present case. See New York Criminal Procedure Law Section 255.20.

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OCT 10 1976

----- X
UNITED STATES ex rel. NANCY ROSNER, :
on behalf of THOMAS LI PUMA, :

Petitioner, :

- against - :

COMMISSIONER, New York State De- :
partment of Correction, et al. :

Respondent. :

75 Civ. 3175
(WCC)

MEMORANDUM
AND ORDER

----- X
A P P E A R A N C E S:

NANCY ROSNER, ESQ.,
Attorney for Petitioner
401 Broadway
New York, New York 10013

HONORABLE LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondents
Two World Trade Center
New York, New York 10047

RHONDA AMKRAUT BAYER, ESQ.,
Assistant Attorney General,
Of Counsel

CONFIDENTIAL, D. J.:

The above-captioned habeas corpus petition was the
subject of a September 24, 1976 Memorandum and Order in which
this Court, concluding that petitioner had been denied effective

A 33

assistance of counsel during the state court proceedings that culminated in his conviction for burglary and petit larceny, ruled that "the judgment of conviction * * * must be vacated and the writ of habeas corpus will be granted unless respondent commences proceedings, within sixty (60) days of the date hereof, to afford petitioner a new trial." Presently before the Court is respondent's motion, under Rule 59(e) F.R.Civ.P., to alter or amend that Order.

A full exposition of the background to the above-captioned proceedings appears in the September 24 Memorandum and, for present purposes, need not be recited anew. It must be noted at the outset, however, that this Court's ruling turned upon the failure -- born of neglect and/or oversight -- of petitioner's trial counsel to press a pre-trial suppression motion that had been potentially "critical to the Li Puma defense." 75 Civ. 3175 at 25. Respondent urges the Court to amend its Order to the extent that the latter, as presently framed, grants "inappropriate relief."

This Court agrees that its earlier ruling appears to provide petitioner more than is due him under the circumstances of this case and, indeed, more than the Court meant to allow. The Court had intended only to restore to petitioner what had been lost to him through his trial counsel's incompetence, i.e., an opportunity to challenge the admissibility of certain evidence allegedly the product of an invalid search and seizure.

It had surely not been this Court's intention to require a retrial of petitioner were the Li Puma suppression motion to prove unsuccessful; the failure of such motion would, after all, demonstrate that petitioner had suffered no ultimate prejudice, notwithstanding his counsel's inattention. Nor had this Court intended that, were the Li Puma suppression motion to prove successful, respondent would be bound to proceed with prosecution without benefit of those portions of the former trial record that would remain admissible at the subsequent trial.

With at least so much clarified, there remains for consideration respondent's present assertion that Li Puma lacked standing to make the contemplated motion to suppress. In proposed support of that argument, respondent cites Jones v. United States, 362 U.S. 257 (1960), Alderman v. United States, 394 U.S. 165 (1969), Wong Sun v. United States, 371 U.S. 471 (1963), United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969), and Craft v. United States, 403 F.2d 360 (9th Cir. 1969).

This Court has thoroughly reviewed each of those decisions and finds nothing therein that might reflect credit upon the proposition submitted by respondent, i.e., that Li Puma lacked standing to move against any and all fruits of the allegedly illegal police entry into Suite 613, in which he was undisputedly a guest of the lawful occupant, because he had secreted himself (with his host's knowledge and consent)

within a closet located in that suite (the better to be shielded from the allegedly illicit view of the police).

Indeed, the Jones decision from which respondent would enlist support could hardly establish more firmly that "anyone legitimately on premises where a search occurs" -- including a "guest" or "invitee" -- "may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U.S. at 267. Perhaps understandably enough, respondent has failed to direct this Court to any authority for the proposition that one may lose such standing by removing himself to a particular location, betraying a particular motive, within the premises lawfully occupied by him. In the absence of binding authority or persuasive reasoning from a litigant, this Court declines to subscribe to the thesis that standing, in the legal sense at least, is perforce inconsistent with running.

Respondent has further argued that Li Puma lacked standing to move for suppression of a pill box found on the person of his companion in Suite 613, on the ground that "fourth amendment rights are personal rights which can not [sic] be vicariously asserted * * * ." Respondent's Brief at 4. Respondent would do better to understand the principle thus recited and/or at least the case to which it is presently addressed. Unhappily, this Court is now obliged to point to

A36

A36

what should be glaringly apparent: it is the alleged invasion of petitioner's own privacy -- through the initial, allegedly illegal, entry by the police -- from which petitioner derives his standing to move against all fruits of the search in Suite 613.

This Court is obliged, further and finally, to note respondent's assertion that, "The only item of evidence [derived from the challenged search] ultimately found to be usable against petitioner was the Geibels' pillbox." Respondent's Brief at 3. Earlier briefs demonstrate that respondent is in fact familiar with the trial testimony of the police officers who participated in the search of, and seizure in, Suite 613, including those portions directed to the incriminatory self-concealment of Li Puma. If respondent had been initially unaware that evidence subject to suppression on fourth amendment grounds may be of a testimonial -- as opposed to physical -- nature, it might ordinarily have been assumed that the Wong Sun decision cited by respondent would have been an immediate source of the needed enlightenment. See 371 U.S. at 485-86.

Petitioner is directed to submit a proposed order amending this Court's September 24, 1976 Order as indicated above. Respondent's motion is otherwise denied.

SO ORDERED.

Dated: New York, New York
October 19, 1976

William P. Conner
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
U.S.A. EX REL THOMAS LIPUMA, :
Petitioner, :
v. : 75 Civ. 3175 WCC
COMMISSIONER, DEPARTMENT OF :
CORRECTIONS, STATE OF NEW YORK, :
WARDEN, NEW YORK STATE CORRECTIONAL :
FACILITY, OSSINING, NEW YORK, :
Respondents.

----- x
Before:
HON. WILLIAM C. CONNER, District Judge
New York, April 14, 1976
Room 906 - 11:00 a.m.

APPEARANCES

ROSNER, FISHER & SCRIBNER, Esqs.,
Attorneys for the Petitioner,
Nancy Rosner, Esq., of Counsel
LOUIS J. LEFKOWITZ, Esq.,
Attorney General, State of New York,
Rhonda Bayer, Esq.,
Deputy Attorney General

- - -

2 (Case called.)

3 MRS. ROSNER: Ready for the petitioner.

4 MRS. BAYER: Ready for the respondent.

5 THE COURT: I have read the memoranda and the
6 petition and response so that we don't have to have any opening
7 statements. You can proceed with the introduction of
8 evidence.

9 MRS. ROSNER: I understand, your Honor, that
10 Mrs. Bayer's witnesses are here and although it is out of
11 turn but for the sake of convenience, since Mr. Coirom is
12 on trial, I understood her witnesses were going to proceed
13 first.

14 THE COURT: Any order that is agreeable with
15 counsel is agreeable with me.

16 MRS. BAYER: Actually I would prefer if your
17 witnesses went first. I just called down to chambers.
18 One of the Assistants from the office is supposed to be
19 here at 11:30 and I would like to wait for him.

20 THE COURT: Is this a witness?

21 MRS. BAYER: He is an attorney. Actually,
22 he is sort of guiding me.

23 MRS. ROSNER: Your Honor, Mr. Hochheiser is
24 here, who is an attorney I believe that Miss Bayer has
25 called and he has asked that his testimony be disposed of

1 rdb

3

2 because he is on trial.

3 THE COURT: I think she wants to wait until her
4 co-counsel arrives.

5 MRS. BAYER: Yes. I will put Mr. Hochheiser on
6 first, if you like, but may I have a couple of minutes?

7 THE COURT: Yes.

8 MR. HOCHHEISER: So the Court isn't misled,
9 Mrs. Rosner thought I was on trial but it is a personal
10 problem I have.

11 THE COURT: She was talking about another
12 attorney being on trial.

13 (Recess.)

14 THE COURT: All right, Miss Bayer.

15 MRS. BAYER: I have been asked to introduce my
16 co-counsel, Ralph McMurray, your Honor.

17 The respondents call Lawrence Hochheiser.

18 L A W R E N C E H O C H H E I S E R, called as a witness
19 on behalf of the respondents, after first being duly
20 sworn, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MRS. BAYER:

23 Q Mr. Hochheiser, what is your occupation,
24 please?

25 A I am an attorney.

1 rdb

Hochheiser-direct

4

2 Q How long have you been practicing law?

3 A Since 1966 approximately.

4 Q Mr. Hochheiser, in 1972 did you have occasion
5 to represent one James Doyle in a criminal proceeding
6 which arose as a result of two burglaries in a Manhattan
7 hotel?

8 A I did represent -- assuming the facts of your
9 questions are correct, the answer is yes, as to the number of
10 burglaries.

11 THE COURT: Mrs. Bayer, will you speak up a
12 little and speak a little slower, please.

13 Q In the course of that representation did you
14 make a motion to suppress on behalf of your client, Mr. Doyle,
15 a motion to suppress?

16 A Yes.

17 THE COURT: I am having some difficulty in
18 understanding you. You are speaking very rapidly and
19 not very loudly.

20 MRS. BAYER: I am sorry, your Honor.

21 Q Mr. Hochheiser, what evidence did that motion
22 seek to suppress?

23 MRS. RO: I couldn't hear the question.

24 THE COURT: You are going to have to speak a
25 little more distinctly, a little more slowly, a little more

1 rdb

Hochheiser-direct

5

2 loudly. We have plenty of time.

3 A Well, I haven't looked.

4 MRS. ROSNER: May I hear the question.

5 (Question read.)

6 A I would say broadly speaking, the motion sought
7 to suppress all that was discovered by the police upon entry
8 into a hotel room, evidently occupied by Mr. Doyle and the two
9 co-defendants, Mr. Lipuma and Mr. Raimondo. That would
10 include certainly physical property which would have been
11 alleged to have been the fruits of the burglary or burglaries
12 as you have indicated. There were also two defendants
13 found in a closet, according to the police, which I would
14 imagine would have been part of the suppressed items.

15 MRS. ROSNER: I object to what Mr. Hochheiser
16 would have imagined. I have obtained a copy of that motion
17 from the file if Mrs. Bayer would like to see it and perhaps
18 introduce it.

19 THE WITNESS: Perhaps if I look at it I can
20 refresh my recollection.

21 THE COURT: You were representing Doyle?

22 THE WITNESS: I represented James Doyle.

23 MRS. ROSNER: I do have an objection, your
24 Honor, to the portion of the witness' answer commencing with
25 "I would imagine."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

6

THE COURT: That objection is sustained and
I will disregard that part of the testimony.

(Pause.)

THE WITNESS: The notice of motion in routine
fashion -- in my routine fashion states that the relief
sought is the suppression from introduction in evidence
all property describe in the indictment and seized, which was
allegedly seized from the defendant. And further sup-
pressing any statements allegedly made by the defendant
in connection therewith, and for such other and further
relief that the Court may deem appropriate.

In the affidavit I more fully explain what
I want. I recite the fact that as a result of the search
that I claim took place, that the property that we spoke
of was seized and found, and I further state
"As a result of said search three persons are alleged
to have been found in the room, including the defendants
and assorted personal property alleged to have been stolen
and the fruits of the burglary."

THE COURT: You don't have to read the
whole thing for us.

Are you going to introduce this as an exhibit
for the respondent?

MRS.BAYER: No, your Honor.

1 rdb

Hochheiser-direct

7

2 THE COURT: Well, let's mark it for identifi-
3 cation then as a petitioner's exhibit.

4 THE WITNESS: The only reason I am belaboring
5 it is it's difficult for me to say exactly what my motion
6 was and limited to. Obviously property was included.

7 Q Mr. Hochheiser, did there come a time
8 when you abandoned efforts to suppress the physical evi-
9 dence found?

10 MRS. ROSNER: Objection to the form, your
11 Honor.

12 THE COURT: Sustained.

13 What happened to this motion?

14 THE WITNESS: Well, ultimately, the motion was
15 either expressly withdrawn or withdrawn by operation of
16 law when my client entered a plea of guilty.

17 THE COURT: The motion was still pending
18 undetermined at the time your defendant decided to plead
19 guilty?

20 THE WITNESS: Yes, sir. There had never been
21 a hearing on the motion or any other action by the Court.

22 Q Mr. Hochheiser, before the motion was withdrawn
23 either actually --

24 MRS. ROSNER: Objection. It assumes a
25 state of facts not in evidence.

THE COURT: I didn't hear the first part.

(Question read.)

MRS. BAYER: I believe it was Mr. Hochheiser's testimony that he either withdraw it --

THE COURT: Go ahead and finish the question. Either actually or?

Q Either actually or by operation of law when your client entered a plea of guilty, did you discuss the circumstances surrounding the seizure of that evidence with your client?

A Yes.

THE COURT: The objection is overruled.

A Yes.

Q Did you discuss it with anyone else?

A Well, I would have discussed it with the attorneys for the two co-defendants.

THE COURT: You say you would have. Did you or didn't you?

THE WITNESS: I don't have a specific recollection of discussing it with Mr. Anolick but I know I discussed it with Mr. Quagliata.

THE COURT: Whom was he representing?

THE WITNESS: He represented Mr. Lipuma.

Q As far as the facts surrounding the seizure

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

9

of this physical evidence is concerned, did you try to ascertain what happened from anyone other than your client?

A Yes. The Assistant District Attorney who was then at the time Thomas Andrews, told me what the state's position was and also allowed me to speak with the policeman. There was at least one policeman and it may have been two or more policemen that I actually spoke to, in a witness room, at which time Mr. Andrews instructed the policemen to just play it straight with me, so to speak, and just tell me everything that happened, as though he were talking to Mr. Andrews.

Q This investigation into the facts surrounding the seizure of the physical evidence was all done prior to the time Mr. Doyle entered his plea of guilty, was it not?

A Oh, yes.

Q And as a result of your investigation you discussed the probable success of the motion with your client, did you not?

MRS. ROSNER: I object to the leading, your Honor.

THE COURT: Yes, sustained.

Q Mr. Hochheiser, let me ask you this: What were your reasons for foregoing the motion?

THE COURT: For what?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

10

MRS. BAYER: Foregoing the motion.

MRS. ROSNER: Objection.

THE COURT: Yes. He never said that he forewent the motion except by operation of law.

MRS. BAYER: May I ask this:

Q Why did you not pursue the motion to suppress but chose instead to advise your client to plead guilty?

THE COURT: The primary reason was that Mr. Doyle, who was allegedly a Travelers check forger on an interstate basis had been arrested and indicted in Connecticut in the federal court, New Haven, I think, and his public defender there had negotiated a plea for that case which arose, I believe, later than the arrest and the circumstances of this case, and arranged for an 8-year sentence in that case.

I had discussed that situation with Judge George Roberts, who was an acting Supreme Court Judge in the State of New York at that time, and Judge Roberts had told me that if Doyle got substantial time in the federal court in Connecticut, and not merely nominal time, that he would accept a plea of guilty under which he would sentence Doyle to concurrent time which he felt would be consistent with his obligation to the community and at the same time would satisfy me that Doyle wouldn't wind

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

11

up doing a million years.

Since my understanding at that time, which never worked out properly, by the way, but that's irrelevant here; since my understanding at that time was that Doyle would in effect do this time at the same time he would do the federal time and would do it in a federal institution, which was better time than a state institution, it is more civilized and easier to do, that it seemed to me that there was no purpose in pursuing this case any more. So I abandoned it.

I also felt, having spoken to the policemen, there was a secondary thing here; since I had spoken to the policemen and I realized what their position was going to be -- whether it was true or not is another story -- but what they were going to testify to, I felt they were clever enough and that their testimony was probably good enough, in my judgment, that they would be likely enough to prevail; that in view of the Connecticut situation I didn't see any point to pursue this case.

THE COURT: Now, let me understand it. Whose testimony did you say you thought would be good enough so that the government would prevail?

THE WITNESS: The policemen, the policemen. After they told me what in effect they would be testifying

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

12

to, I realized that, A, if their testimony was true and believed that they would probably win; or, B, if their testimony was false that they were pretty clever policemen and knew the law well enough to lie effectively enough to beat Doyle, who had an extensive criminal record.

THE COURT: I don't understand whether you mean they would be able to defeat the motion to suppress or whether they would be able to get a conviction even if the motion to suppress were granted.

THE WITNESS: I meant they would defeat the motion to suppress because if the motion to suppress were granted I don't think they could have gotten a conviction.

THE COURT: So it was your judgment that the motion to suppress was probably going to be defeated one way or another?

THE WITNESS: In the context of understanding the Connecticut situation. You see, without the Connecticut situation I would not have come to that conclusion. Without the Connecticut situation I would have said that this may be tough but I am going to do it and we would have done it. With the Connecticut situation the instant case looked tough enough and my success or change of my success looked bleak enough that I took the opportunity to get in on the concurrent situation with New Haven.

1

rdb

Hochheiser-direct

13

2

But that was my own personal or Doyle's own personal

3

situation. It wasn't a situation that involved the en-

4

tire case. The other defendants had nothing to do with

5

Doyle in Connecticut.

6

As I say, if I didn't have the Connecticut

7

case to use as an umbrella, so to speak, I would have

8

proceeded.

9

THE COURT: Allright.

10

THE WITNESS: I know lawyers talk too much, but

11

even if I had the Connecticut situation and if I thought

12

this motion was so one-sided in my favor that I couldn't

13

lose, you know, which is almost never the case, then I might

14

have gone anyway, although it still would have been an

15

exercise, an academic exercise.

16

Q Mr. Hochheiser, is there any particular reason

17

why you did not go forward with the motion to suppress and

18

feeling that you could have advised your client to plead

19

guilty after the hearing if he lost it?

20

MRS. ROSNER: I object, your Honor. I don't

21

understand the question.

22

THE WITNESS: Well, it seems to me, if I do

23

understand it, you are asking him to repeat what he just

24

got through saying.

25

MRS. ROSNER: Could the question be rephrased?

I got the same import.

THE COURT: Rephrase it.

Q Would it have been possible for your client to have entered a plea of guilty subsequent to a hearing on a motion to suppress?

A I will have to answer it this way: It would have been theoretically possible as the law of the State of New York allows an appeal following a plea of guilty after the denial of a suppression motion. You still preserve your right to appeal the motion to suppress. So that there is some benefit to taking a motion to suppress and then taking a plea.

But the practical answer is prosecutors don't let you do it. If you want the plea, you give up the motion generally. It is not universal but generally. I can tell you that this particular prosecutor who took over the case, Mr. Kriedman, was not the most liberal Assistant District Attorney in that office, and I can tell you most certainly that there was no possibility of having that motion heard and then getting the plea that I thought I worked out.

Q Did you discuss this with Mr. Kriedman specifically?

A I cannot give you a specific recollection of a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbbr

Hochheiser-direct

15

discussion about it or, you know, a specific picture in my mind of this happening. I am telling you why but I don't recall the details of where and when.

Q What I am trying to find out, Mr. Hochheiser, is what is the basis for the testimony if you had gone forward with the motion to suppress, Mr. Kriedman would not have joined you in recommending that the Court accept a plea of guilty from Mr. Doyle?

A First of all, it would always be my practice to get as much as I can. Naturally, I would always, if I could have the opportunity, I would always take the opportunity to preserve a record on a motion to suppress. Indeed, if for no other reason, to be perfectly honest with you, since I was friendly with at least one other lawyer and Doyle was friendly with the co-defendants, if for no other reason I would have taken the motion just so the evidence in the record would have been available to them in their motion when they had a hearing.

Q Mr. Hochheiser, when you spoke to the police what did they tell you their testimony was going to be?

A Essentially, if I recall, and I have refreshed my recollection from your minutes, they said that there had been a burglary or perhaps more than one burglary in this hotel, which hotel was populated largely by residents as

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

16

opposed to transients. As I recall, there was only one floor or so of transients and perhaps only three or so registered transients in the hotel at the time. And that one of the people, whether a resident or a transient, my recollection is they were from out of town, came into a hotel room and discovered I think it was two people in a room, and I don't remember which of the three defendants it was claimed to have been. I don't even remember if my client was claimed to have been one.

They were in the room and they were confronted by the people who were renting the room and were told that they were security people and there were some burglaries going on and these people got suspicious, called the desk and asked if they had security people running around up here looking for burglaries, and the desk said no.

They called the police, they sealed off the building. The police happened to be right outside in the vicinity, a car. They came in and they asked to see which rooms had transient people in them. This is my recollection now.

The police went with a master key or with a man with a master key from the desk. Now, when they spoke to me I think they denied they used a master key, but they had it and I believe they said they had it. I believe

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdb

Hochheiser-direct

17

that my investigator, I hired an investigator, who found it. Someone gave a statement that they went up with a key.

And the police told me they knocked on the door and that Doyle answered the door and said "What do you guys want? I am a salesman. I am sleeping, you are waking me up."

In other words, in effect tried to con them and bluff them so that they would say that we are sorry, good by.

Their testimony was like he said "Why don't you come in and look around." From the door, without stepping over the threshold they saw in plain view, as the doctrine goes "I think it was a fur of some sort."

I don't recall whether it had been identified to them as a stolen property to them at that time or what they realized.

And based on that they came in, looked around and they opened a closet and they claimed that in the closet they found the two co-defendants, Limpuma and Raimondo, and they were hidden in the closet. They looked in the closet and searched around with their guns drawn, and so forth.

That's what the police told me.

Q Mr. Hochheiser, prior to the time that Mr. Doyle

1 entered his plea of guilty did you discuss the probable
2 success of this motion to suppress with counsel or either
3 of the co-defendants?
4

5 A Well, I certainly discussed the facts of the
6 motion. I certainly discussed what the police had told me
7 their testimony would be. I certainly discussed what my
8 client claimed happened and what at least Mr. Quagliata's
9 client had claimed had happened. Whether I actually
10 discussed the probable success or probable failure, I mean
11 I just can't say. This was 1972 or something like that.

12 The reason, by the way, I keep leaving out,
13 counselor, Mr. Raimondo was because at that time my recol-
14 lection is he had a trial scheduled of such a nature that
15 he was never there. So most of my conversations were with
16 Quagliata or Mike Coirom, who was his partner. Anolick,
17 I hardly ever had much to do with in the case.

18 Q So I want to understand your last answer. You
19 discussed certain aspects of it with Mr. Quagliata, you
20 are not sure, but you don't remember discussing the like-
21 lihood of success of the motion, is that correct?

22 A I just don't have a recollection either way
23 that we discussed the probable success or not. I can give
24 you a natural inference, but we could all draw those.

25 Q Do you remember being called into Supreme Court

during Mr. Lipuma's trial?

A Yes.

Q Do you remember being asked certain questions by Judge Frayman?

A Yes.

Q Would you please --

A I didn't remember if it was Judge Frayman but the trial judge, yes, sir.

Q Please tell us what that inquiry was all about, why you were called in?

A As I understood it during the course of the trial, and I was not familiar with the trial, I am still not and I have never heard or read the testimony of trial, Mr. Coirom had evidently asked Judge Frayman to allow him to proceed to a hearing on a motion to suppress evidence arising out of some testimony that came out from a police office which was evidently inconsistent with another police officer's testimony and would have involved a violation of constitutional rights, search and seizure.

My understanding was that Judge Frayman had declined to allow him to do that, claiming he hadn't made a motion and had waived the motion. Mike Coirom evidently told the judge that wasn't so, that he had joined in my motion which was on file. So the Judge

20

wanted to hear from me and from Mr. Quaqliata, and reading your transcripts my recollection was refreshed that Mr. Coirom announced that Mr. Quaqliata, and reading your transcripts my recollection was refreshed that Mr. Coirom announced that Mr. Quaqliata wasn't yet there but I was there so the judge said he would hear my statement. He asked me what the history of this motion to suppress was or was not. And would you like me to recite essentially what I told Judge Frayman at that time?

Q Yes, please.

A At that time I told Judge Frayman that Mr. Quagliata had made what I would term an omnibus motion -- I'll withdraw that.

He had made a motion for a bill of particulars, and perhaps for some other things, which I did not make. I made a motion to suppress the evidence that was found in the room arising out of the entry or the observations in, the room by the police officers.

I told Judge Frayman that though I could not recall a specific time and place and that I did not have a particular picture of the events happening in my mind, that it had been my understanding over the period of that year, or whatever the pendency of that litigation was, that Judge Leff, who had been the previous judge in the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbbr

Hoccheiser-direct

21

case, and the prosecutor, Tom Andrews, and myself and Mr. Quagliata had all understood there was a time when Mr. Quagliata had told Judge Leff that he joined in my motion to suppress. I certainly understood I was the beneficiary of Mr. Quagliata's bills of particulars.

THE COURT: You were the beneficiary of what?

THE WITNESS: Of the particulars demanded by Mr. Quagliata's motion. I could not recall whether any such discussion ever took place on the record, and to my knowledge no one has ever found any such record. I told Judge Frayman, I believe, that I spoke to the prosecutor, Tom Andrews, and asked him what his recollection was and Tom Andrews had told me that he had no recollection either way. He didn't recall that Quagliata had joined in the motion and he didn't recall that he had not joined in the motion. Essentially I think I explained to Judge Frayman why I had abandoned the motion without really giving any further thought to Mr. Quagliata or Mr. Coirom or Mr. Lipuma or anybody else in the case, but because I was just thinking about my position with my client.

I think that is basically the sum and substance of what I told Judge Frayman.

Q Mr. Hoccheiser, did you not also represent to Judge Frayman that you had in fact discussed the likeli-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hoccheiser-direct

22

hood of success on the motion with Mr. Quagliata?

A I may have. I did read that and if it says so in there it is accurate.

Q Perhaps this will refresh your recollection.

Starting with the very bottom of 489 and continuing to page 490.

A (Reading) It might be easier if I said what I said. It is one sentence.

THE COURT: All right.

A "Indeed at that time, Judge, I couldn't really make a determination whether my client or the police were telling me what the true facts are, if either one of them knew. However, I did relate this in its entirety to Mr. Quagliata and I think we both agreed that the motion to suppress was ill fated as far as the defendants go, in terms of the practical quality of the testimony."

Q Thank you.

A That's what I said at the time.

Q Mr. Hochheiser, do you know when the motion to suppress on behalf of Mr. Doyle was made?

A I don't recall the date. I think there is a docket sheet somewhere in the courtroom. I thought Mrs. Rosner had it.

MRS. ROSNER: The motion has a return date

MRS. ROSNER: May I, your Honor, show the witness something which may facilitate his answer?

THE COURT: Yes.

(Pause.)

THE WITNESS: The following words appear:

"May 3, 1973, Judge George F. Roberts," and it says "Doyle before trial pleaded guilty, burglary second degree, the first count."

That's what it says.

Q Mr. Hochheiser, do you remember informing counsel for the co-defendants of your client's decision to enter a plea of guilty?

A I don't remember informing them of it, but I can tell you that everybody knew, if you understand what I am saying. I don't recall the time and place that I would have informed co-counsel, but the relationship among the defendants and the counsel were such that if Doyle entered a plea of guilty everybody knew.

Q Mr. Hochheiser, at any time during these proceedings did you represent Thomas Lipuma?

A No. Even that can have a shade to it, you know. I represented one defendant and my obligations were to the one defendant. But in all fairness, these were three fellows who were three friends --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochhauser-direct

25

MRS. ROSNER: I am going to object and move to strike as not responsive to the question.

THE COURT: I will permit you to complete the answer. Go ahead. There were three friends and what?

THE WITNESS: I just want you to understand that I represented James Doyle. However, there was a unity in purpose among the counsel. It was not one of those situations where I was -- my interests were antagonistic to counsel's interests like they would be with a prosecutor and sometimes in a joint trial. I represented Doyle but I was not an adversary of either of the other co-defendants.

Q Prior to the time that Mr. Coirom entered his notice of appearance or was retained and began his representation of Mr. Lipuma, did you not represent Mr. Lipuma?

A No. I wouldn't swear that I didn't -- I don't know what you have in mind. I wouldn't swear that I didn't stand up for him at some time and place, but as a practical answer the answer is no, I never represented Mr. Lipuma. I never filed for Mr. Lipuma, I never sat down with Mr. Lipuma, I was never paid by Mr. Lipuma. I only make that exception just in case the record might show that at some time when they were first arrested or something maybe I stood up on behalf of one or more of them but

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbbr

Hochheiser-direct

26

I didn't represent Mr. Lipuma.

Q Let me ask you, prior to the time that you knew of Mr. Coirom's entry in the case were you dealing with anyone as counselor for Lipuma, were you discussing his case with anyone, was there any attorney that you knew of?

THE COURT: I didn't hear the question.

Q Prior to the time Mr. Coirom began representing Lipuma, if you were aware and had discussions with perhaps another attorney who was representing Mr. Lipuma at the time?

A Unless my recollection would be refreshed to the contrary, I don't recall anybody representing Mr. Lipuma before Mr. Coirom represented Mr. Lipuma. I mean that may not be accurate. I just have no recollection of that happening.

Q Perhaps this can refresh your recollection. I am on page 422 of the minutes of trial.

A (Reading) Mr. Coirom was substituted on May 16, 1972, substituted for Mr. Hochheiser. Well, that would be at the very earliest stages, yes.

Q You did represent Mr. Lipuma?

A Evidently, nominally.

Q You testified that you made your motion to suppress on April 6, 1972, which was during your repre-

1 rdbr
2 Hochheiser-direct
3 27
4 sentation of Mr. Lipuma as well as Mr. Doyle, was it not?

5 A No, it couldn't be. It may be that there my
6 name might have still be carried in a court folder or some-
7 thing like that, but at the time I made that motion
8 I didn't represent Mr. Lipuma. I represented Mr. Doyle. The
9 notice of motion says so, my affidavit says so.

10 Q The notice of motion says that you were
11 Doyle's counsel, does it not?

12 A Yes.

13 Q It doesn't say that he was the only client you
14 had?

15 MRS. ROSNER: I object, your Honor. They are
16 referring to a document. It speaks for itself, if she
17 wants to admit it.

18 THE COURT: All right. I am a little bit in
19 the dark as to why the respondent wants to show that at the
20 time the motion was made the witness was not representing Lipuma.
21 It seems to me that it is contrary to the government's
22 interest because it would overcome one of the grounds that the
23 trial court had for not permitting a hearing on the
24 motion to suppress.

25 MRS. BAYER: Your Honor, there is an indication
 in the minutes of trial that prior to Mr. Coirom's
 appearance in the case, that Mr. Hoccheiser represented

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

28

Lipuma. What I am trying to determine is if Mr. Hochheiser did represent Mr. Lipuma at the time he made his motions to suppress on behalf of Doyle, why in fact he did not make one on behalf of Lipuma as well.

THE COURT: You are saying then that the motion was made only on behalf of Doyle?

THE WITNESS: Yes, sir. I am saying something more than that.

THE COURT: I know you are.

THE WITNESS: There isn't any way in the world that I could have made a motion for one of two clients that I represented and not make a motion for another client that I represented.

What I am telling you is --

THE COURT: If that were true you would have proven the petitioner's case, I would think. If he represented both defendants at the time he made the motion, made the motion on behalf of only one defendant even though obviously it was equally applicable to the other, you would have proven what Mrs. Rosner is trying to prove, that Lipuma was improperly represented at that time in spades.

MRS. BAYER: If in fact Mr. Hochheiser had represented both and if in fact he had made the motion to suppress for one and had not for the other, then

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-direct

29

I would assume he had a reason for it. It may be possible --

THE COURT: All right, did you have any reason for making it on behalf of Doyle and not Lipuma, assuming you had represented both? Was the motion any more applicable to Doyle than it was to Lipuma?

THE WITNESS: No. They all stood in the same position. There could not have been any reason for making it on behalf of one and not the other. The only reason it was made on behalf of Doyle is because at the time the motion was drawn my office represented Doyle. We didn't represent Lipuma.

If I could explain one thing to the Judge. In the state courts things work a little differently and sometimes a little more haphazardly than they do here in the federal courts, and it is not unusual in a situation where three people are arrested for one lawyer to sort of do a favor at the early stages, following the arrest for not only his own client but for another person in the case, just until the other person can get another lawyer or actually hire a lawyer, and the judges often invite this. They will say, Mr. Hochheiser, are you standing up for the three of them for the purposes of bail, et cetera. They want a lawyer to facilitate the proceedings sometimes at the early stages. Sometimes they appoint legal aid even if the

2 man is a millionaire just to do that until he gets a lawyer.
3 So this kind of representation of Lipuma was probably that.

4 I don't have a specific recollection. I can
5 tell you I would never have taken a fee from Mr. Lipuma.
6 I am sure I never sat down attorney to client with Mr.
7 Lipuma. This is a nominal representation, if it is a
8 representation. It is a formality, but I represented
9 Doyle.

10 Q The only thing I am trying to determine is when
11 that motion was made in April whether you did represent
12 Mr. Lipuma or not.

13 A No. If I did represent him, and I am really
14 trying to keep out of my head whose interests are
15 here -- I am trying to tell you what happened a couple of
16 years ago. If I did represent Lipuma I would have made
17 a motion for him at that time. I just would have added the
18 name to the piece of paper. I never make a motion on
19 behalf of one fellow and not another if I represent two.

20 MRS. BAYER: Thank you very much.

21 CROSS EXAMINATION

22 BY MRS. ROSNER:

23 Q Good morning, Mr. Hochheiser. Can we fix
24 some dates to the best of your recollection so the Court
25 has a perspective on when various things happned. Do you

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr Hochheiser-cross 31
have a recollection of when the arrest occurred in this
case?

A Well, no.

Q Would it be fair to state that it was approx-
imately, or would it refresh your recollection if I sug-
gested it was approximately January of 1972?

A That would sound right. The indictment was
filed in February, was it?

Q Let us take it a step at a time. Was that
arrest upon a felony complaint as opposed to an indictment?

A Yes.

Q Did there subsequently come a time when an
indictment was handed down?

A Yes.

Q Do you recollect the date?

A No.

Q Would it refresh your recollection if I sug-
gested it was approximately March of 1972?

A Approximately. I can't really say. See,
this sheet that I have in front of me says the indictment
was filed February 14th.

xxxxxx

(Petitioner's Exhibit 2 was marked for
identification.)

Q Do you recollect, Mr. Hochheiser, appearing

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr Hochheiser-cross

32

on the arraignment on the indictment?

A I don't.

Q May I show you what has been marked Petitioner's 2 for identification. You may direct your attention to the top line and see if that refreshes your recollection concerning the date of the arraignment in Supreme Court in New York County on the indictment herein.

A Notice of appearance was filed by me March 7, 1972 in Part 30, which is the arraignment part.

Q Now, do you have a recollection, sir, whether at the arraignment you represented all of the individuals who had been arrested?

A I don't have an independent recollection.

Q Apart from the possibility that you represented Mr. Lipuma on the arraignment hearing, did you represent him in any other capacity after the arraignment?

A No.

Q Now, you indicated Mr. Hochheiser, that a time came when you interviewed the police officers concerning what their testimony would be on the motion to suppress; is that right?

A Yes.

Q And you indicated, did you not, that the police officers said that they would testify that they had gotten

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Hochheiser-cross

33

consent to enter the room which was searched; is that correct?

A Yes.

Q Now, had you had discussion with your client concerning the method by which the police entered that room, and by your client I refer to Mr. Doyle?

A Yes.

Q What did Mr. Doyle tell you concerning the manner by which the policemen gained entry to this room?

A He said, to the best of my recollection, that the entrance, and I don't recall the exact details but it was both -- it involved surreptitious entry and violent entry. I remember he said there was a door that was knocked down in the adjoining room and he spoke of master keys being used and policemen forcing their way in with guns.

Q Did Mr. Doyle indicate to you in any way that he consented to the entry of the policemen into that room?

A No, he said he did not. He also said that the other difference, the other important difference he said that the property they claimed was in plain view, what I recall to be the fur on the bed, that that was not so, it wasn't there.

Q Now, from the version of events which your client

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbbr

Hochheiser-cross

34

gave you, did you have an opinion, if his version of the facts were to prevail on the hearing, whether there was a meritorious motion to suppress?

A I did.

Q And what would that opinion have been?

A That the motion would have been meritorious for the defendant -- not only would the property have been suppressed but the statements, the line-up. And Raimondo and Lipuma would have been suppressed too, which their presence didn't help Doyle.

Q Now, did you discuss with Mr. Quagliata or anyone else representing Mr. Lipuma your client's version of the police officers entry into that room?

A Yes.

Q Now, did you encounter any -- withdrawn.

Was there a practical problem in your opinion in prevailing on the motion?

A Yes, there was.

Q What was that problem?

A The policemen seemed experienced, clever, knowledgeable about the law and what testimony would be required for them to defeat the motion to suppress. They were prepared to testify in such a manner that in my opinion if they were believed, the motion to suppress would have been

1

rdbr

Hochheiser-cross

35

2

defeated by the policemen and my client's credibility was

3

subject to serious question since he was essentially

4

a professional thief for many years, unemployed, and

5

with many, many arrests and convictions for all sorts of

6

crimes.

7

Q If you had not had the opportunity to subsume

8

this charge effectively within the Connecticut federal

9

charge and if you had proceeded to trial on this indictment

10

with Mr. Doyle, would you have pursued the motion to suppress

11

on his behalf?

12

A Oh, definitely.

13

Q And is it your opinion that all of the defend-

14

ants stood in the same position with regard to the viability

15

of the motion to suppress, as did Mr. Doyle?

16

A Exactly.

17

Q Now, you indicated that there was an understanding

18

among the various participants here that the motion to

19

suppress was made on behalf of all the co-defendants; am

20

I correctly stating your testimony?

21

A Yes. We have to remove it once more. I had

22

an understanding, I had a state of mind that there was

23

such an understanding.

24

Q Do you have a specific recollection whether

25

Mr. Coirom, Mr. Quagliata or anyone else purporting to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr Hochheiser-cross 36
represent Mr. Lipuma ever on the record joined in your motion
to suppress either orally or by filing any document
that so indicated?

A I have no such recollection.

Q Do you know for a fact whether that was
done? Was there any joining of your motion on the record
in any way by counsel for Mr. Lipuma?

A You see, that is the problem. Do I know for
a fact? To that limited question I have to say no.

Q Now, it is also a fact, is it not, that Mr.
Doyle pled guilty to this indictment approximately a year
before Mr. Lipuma's case proceeded to trial?

A That sounds correct.

Q You indicated that you has a conversation
at somepoint in time with Mr. Quaqliata concerning the
merits of the motion to suppress; is that right?

A Yes.

Q And am I correct that part of that discussion
involved the variance between the police officers' version
of the events and the defendants' version of the events?

A Yes.

Q Did Mr. Quaqliata inform you in words or sub-
stance at any time that he intended not to pursue that motion
on behalf of Mr. Lipuma for any reason?

No.

Honor.

MRS. BAYER: No, your Honor.

overall view of the proceedings.

MRS. BAYER: No objection.

received in evidence.)

I may.

draw a motion for Mr. Lipuma?

your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdb

38

THE COURT: All right.

We will recess now until five minutes after one.

I think by that time Mr. Coirom should be here.

MRS. ROSNER: I have a witness that proceed now, if your Honor wants to. Mr. Quagliata is here.

THE COURT: If we go ahead right now without some break for lunch, then we won't get it in. If we go now and come back at, say five after one, we can take Mr. Coirom and any other witnesses.

MRS. ROSNER: Thank you, Judge.

(Luncheon recess.)

1 rdbbr

39

2 AFTERNOON SESSION

3 1:05 p.m.

4
5 (In open court.)

6 MRS. ROSNER: I am prepared to proceed by calling
7 Mr. Quagliata at this time.

8 THE COURT: I understand that Mr. Coirom is not here
9 yet.

10 MRS. ROSNER: He is not, your Honor.

11 S A L V A T O R E F. Q U A G L I A T A, called
12 as a witness on behalf of the petitioner, after
13 being duly sworn, was examined and testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MRS. ROSNER:

17 Q Good afternoon, Mr. Quagliata, what is your
18 profession, sir?

19 A I am an attorney.

20 Q How long have you been an attorney?

21 A 1968.

22 Q In 1972 did you have any professional associ-
23 ation?

24 A Yes, ma'am, I did.

25 Q What was that?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

39

AFTERNOON SESSION

1:05 p.m.

(In open court.)

MRS. ROSNER: I am prepared to proceed by calling
Mr. Quagliata at this time.

THE COURT: I understand that Mr. Coirom is not here
yet.

MRS. ROSNER: He is not, your Honor.

SALVATORE F. QUAGLIATA, called
as a witness on behalf of the petitioner, after
being duly sworn, was examined and testified as
follows:

DIRECT EXAMINATION

BY MRS. ROSNER:

Q Good afternoon, Mr. Quagliata, what is your
profession, sir?

A I am an attorney.

Q How long have you been an attorney?

A 1968.

Q In 1972 did you have any professional associ-
ation?

A Yes, ma'am, I did.

Q What was that?

1 rdbrr

39

2 AFTERNOON SESSION

3 1:05 p.m.

4
5 (In open court.)

6 MRS. ROSNER: I am prepared to proceed by calling
7 Mr. Quagliata at this time.

8 THE COURT: I understand that Mr. Coirom is not here
9 yet.

10 MRS. ROSNER: He is not, your Honor.

11 S A L V A T O R E F. Q U A G L I A T A, called
12 as a witness on behalf of the petitioner, after
13 being duly sworn, was examined and testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MRS. ROSNER:

17 Q Good afternoon, Mr. Quagliata, what is your
18 profession, sir?

19 A I am an attorney.

20 Q How long have you been an attorney?

21 A 1968.

22 Q In 1972 did you have any professional associ-
23 ation?

24 A Yes, ma'am, I did.

25 Q What was that?

1

rdbr

Quagliata-direct

41

2

Q Now, at the time you entered the case did you take over Mr. Lipuma's representation from some other attorney?

4

5

A Yes, ma'am.

6

Q Who was that?

7

A Mr. Hochheiser, as I remember it, had represented Mr. Lipuma prior to our accepting representation --

8

responsibility of representing him. We represented him for all purposes. I think, in effect, Mr. Hochheiser represented him only as a convenience until he got an attorney that would represent him for the balance of the proceeding.

9

10

11

12

13

14

Q Did Mr. Hochheiser turn over to you any papers such as memoranda reflecting conversations with Mr. Lipuma or anything else in the nature of work product or a file for Mr. Lipuma?

15

16

17

18

A I don't remember any such transmission of information, no.

19

20

Q Now, after you began to represent Mr. Lipuma did there ever come a time when you had a conversation with him concerning the defense, the motions to be made or other matters to be done on his behalf?

21

22

23

24

A Yes, ma'am.

25

Q And can you indicate for the Court approximately

when after you began representing him the first such conversation occurred?

A There were many conversations that I had with Mr. Lipuma, because at that time Mr. Lipuma was one of the first cases that I had anything to do with as a private attorney. It was my responsibility at that time within the office to do the motion practice for almost all of the cases. Certainly in Mr. Lipuma's case.

I had conversations with Mr. Lipuma, together with Mr. Coirom, in order to prepare the papers and also conversations thereafter in order to apprise Mr. Lipuma as to what stage of the litigation we were in and exactly what was done and what he could expect in terms of court proceedings.

Q Now, am I correctly understanding your testimony, within your professional association it was your personal responsibility to prepare the pretrial motions on Mr. Lipuma's case?

A That is exactly accurate.

Q Was that generally your responsibility with respect to other cases in your office?

A Yes, ma'am, at that time it was.

THE COURT: Excuse me, is this Mr. Coiro that just came in?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Quagliata-direct

43

MRS. ROSNER: Yes.

THE COURT: Do you want to interrupt for him so he
can get back to the other trial?

MR. COIRO : The Judge recessed until 2 o'clock.
I have to be back at 2 o'clock.

THE COURT: I think we have to take him right
now.

THE WITNESS: I am on trial in an A felony in
Queens.

THE COURT: Are you on trial today?

THE WITNESS: Yes, I am.

THE COURT: What time were you supposed to be
back?

THE WITNESS: As soon as I finish here.

MRS. ROSNER: I won't be more than ten minutes on
direct?

THE COURT: If you want to grab a sandwich on
the 28th floor and come back, Mr. Coiro., you may.

MR. COIRO : It is all right, Judge. I don't
each lunch anyway.

BY MRS. ROSNER:

Q Did you have any discussions with Mr. Lipuma
relative to the making of pretrial motions?

A Yes, ma'am, I did.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Quagliata-direct

44

Q Did you have discussions concerning a possible motion to suppress?

A Yes, ma'am, I did.

Q What, if anything, did Mr. Lipuma tell you concerning the motion to suppress?

Let me rephrase that. What did he tell you about the facts which would relate to a motion to suppress?

A He told me that he was arrested with two other people in a hotel room; that he was invited to the hotel room, I think, by Mr. Doyle, who was a friend of his; that there was some commotion -- that he had been in the room for 10, 15 minutes and there was some commotion outside. There was a racket outside; that there was a knock on the door; the door was opened, I believe he said, by Mr. Doyle. That he ran into a closet; that thereafter all the defendants were arrested.

Q Did he describe for you whether there was anything visible in the room such as furs or anything on a bed?

A He described it but he said that there was not.

Q That what was not?

A There was nothing obvious or noticeable to him regarding furs in the room.

Q Now, did Mr. Lipuma say anything to you about

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr Quagliata-direct

46

open view to be seen by the officers.

Q Do I understand your testimony then that you believed a valid motion to suppress would lie based on the defendant's version of the events?

A Yes, ma'am.

Q At any time in the course of your representation of Mr. Lipuma did you or anyone in your professional association file on written papers a motion to suppress physical evidence?

A No.

Q Did you or anyone in your professional association join on the record in some recorded way in Mr. Hochheiser's motion to suppress made on behalf of his client?

A Ma'am, in answer to the question I have to say that I do not know, and the reason I do not know is because when things probably came to light when Mr. Coirom was on trial before Judge Frayman, I went up and tried to gather all of the different reports before whom I had appeared. At that time Judge Leff had the case. I had a distinct recollection that I told Judge Leff that I joined in Mr. Hochheiser's motion and Mr. Hochheiser said he would get the benefit of the motions that I made.

I thought that that conversation with Judge Leff was on the record.

2 When the problem came up before Judge Frayman
3 I tried to get all of the different reporters that were
4 present and took the proceedings in a stenographic way so that
5 I could determine and prove that it was on the record.
6 I was successful in finding a portion of those stenographers
7 and they did read back the proceedings as they had taken
8 them down but I did not get all of the stenographers --
9 I remember one was on vacation in California and another
10 one was unavailable. So I do not know whether or not
11 at this time it was on the record.

12 Q Were you aware of a requirement under New York
13 law in 1972 that motions to suppress be made in writing as
14 opposed to orally?

15 A I was certainly aware of that, except that I was
16 also aware that if the District Attorney consented to an
17 oral motion or consented in your joining in co-counsel's
18 application, then as a practical matter, and I would also
19 think as a matter of law, it did not have to be on paper.

20 Q Now, do you have a recollection of any District
21 Attorney consenting at any time to Mr. Lipuma's joining in
22 Mr. Hochheiser's motion?

23 A Well, let me tell you what I remember.

24 I was before Judge Lee some time shortly
25 either at the date when my motion was returnable in June

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdb

Quagliata-direct

48

of 1972 or some time very shortly thereafter, I remember telling Judge Leff that I -- that prior to trial, whenever that did come about, there would be a motion to suppress physical evidence, that there would be a motion for a Wade type of hearing, that also the bill of particulars would have to comply and that the reason I knew there were those different applications because I was familiar with Mr. Hochheiser's application and I joined in that and then Mr. Hochheiser said that he would get the benefit of Mr. Quagliata's bill of particulars.

Mr. Andrews at that time was the Assistant District Attorney and he indicated that that would be no problem.

Q I take it, though, you don't know whether that conversation was made a matter of record; is that your testimony?

A I do not know.

Q Now, did there come a time when you had a discussion with Mr. Lipuma concerning whether a motion to suppress had been made on his behalf?

A Yes, ma'am, there did.

Q Will you tell the Court the circumstances.

A I remember one distinctly. In either July or August, and I fix the time because I know it was rather

2 warm, I had appeared for Mr. Lipuma for the purpose of
3 obtaining an adjournment. I knew the case would be
4 adjourned. I went into Manhattan and the case was
5 adjourned. As we walked out of court, Mr. Coiro was there,
6 it was very close to 1 o'clock, which is lunch time. The
7 three of us then went to Vincent's to have lunch together.
8 While we were at Vincent's we discussed with Mr. Lipuma
9 his case, what had been done, what he could expect in the
10 nature of the proceedings and I remember that I told him
11 that there would be two motions prior to trial which were
12 made. One was a motion to suppress physical evidence,
13 one was a Wade type motion.

14 Q In that conversation did you represent to him that
15 those motions had been made?

16 A I did.

17 Q Now --

18 THE COURT: You referred to a Wade type
19 motion.

20 THE WITNESS: Identification, sir.

21 THE COURT: I know, I know. You are not
22 talking about the motion to suppress though when you talk
23 about a Wade type hearing, do you?

24 THE WITNESS: I am not referring to that, your
25 Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Quagliata-direct

50

Q Did you tell Mr. Lipuma in addition to a Wade type motion a motion to suppress physical had been made?

A Yes, I did.

Q You said this was July or August.

Now, can you fix the year?

A 1972.

Q Now --

A Because it was shortly after my motion was returnable, and it was in the summertime. So it would have to be '72 and it would have to be either July or August of that year.

Q When you say your motion, are you referring to your motion for a bill of particulars?

A Yes, ma'am, I am.

Q Now, there came a time, did there not, when Mr. Hochheiser interviewed the police officers in connection with the events of the day of the arrest; is that right?

A Yes, ma'am.

Q Can you fix the time of that interview for the Court?

A Let me tell you what happened that day. First to fix the time, in answer to your question, that was probably a year after the time period that we are talking about. In other words, this was probably some time

2 Q Did you tell Mr. Lipuma in addition to a Wade
3 type motion a motion to suppress physical had been made?

4 A Yes, I did.

5 Q You said this was July or August.

6 Now, can you fix the year?

7 A 1972.

8 Q Now --

9 A Because it was shortly after my motion was
10 returnable, and it was in the summertime. So it would
11 have to be '72 and it would have to be either July or August
12 of that year.

13 Q When you say your motion, are you referring
14 to your motion for a bill of particulars?

15 A Yes, ma'am, I am.

16 Q Now, there came a time, did there not, when
17 Mr. Hochheiser interviewed the police officers in connection
18 with the events of the day of the arrest; is that right?

19 A Yes, ma'am.

20 Q Can you fix the time of that interview for the
21 Court?

22 A Let me tell you what happened that day. First
23 to fix the time, in answer to your question, that was
24 probably a year after the time period that we are talking
25 about. In other words, this was probably some time

in 1973, is the closest I could come to it. I will tell you, if you want exactly what I remember about it.

Q Please do.

A I had been to court in Manhattan late that day. When I finally got to Manhattan and I was told by one of the court personnel that Mr. Hochheiser and Mr. Andrews were in another room which is close to that particular courtroom. When I got there Mr. Hochheiser was there, Mr. Andrews was there, and as I remember it there was one of the police officers involved in the Lipuma case that was on the telephone.

I had a conversation at that time with Mr. Hochheiser and Mr. Andrews and I learned -- and Mr. Hochheiser told me that they had or he had already spoken with the different detectives about the case. When I looked at him he said "Well, I couldn't wait for you any more and I wanted to take advantage of the discovery I could get."

We had a discussion as to what they said. He told me basically what they had said.

At that time we both knew that there would be a problem in proving the motion to suppress.

Q When you say there would be a problem, what specifically do you have in mind?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdb

Quagliata-direct

52

A Well, it became clear to me after a conversation with Mr. Andrews and more of the conversation with me was with Mr. Hochheiser, that the police officers would testify, No. 1, that this was a consent search, and as I remember it, that Mr. Doyle had answered the door and invited them in and invited them to inspect the room. No. 2, it became clear to me we could expect the police officers to testify that, as I remember it, it was one fur which was in open view and that the police officers and the people's claim was going to be that they were in the room, the police officers were in the room legally, that's No. 1.

While they were in the premises legally they saw a fur which they had reasonable cause to believe was stolen, and that further pursuant to that they searched the rest of the room and they found the contraband which was the gravamen of the indictment.

Q Now, at this point in time did you have reason to believe that you might be able to show no consent because of the forcible entry of the other rooms?

A Yes.

Q And will you tell the Court about that, please.

A Yes. There was also other discussion --

1 when I say I knew we had a problem, I am not saying to you,
2 counselor, that I knew it was a bad motion or anything like
3 that. When I say I knew there would be a problem is
4 because that's the first time when we knew what the people's
5 position was going to be or what we could expect the people's
6 position to be in the way of testimony at the hearing. We
7 knew shortly before that time there was one investigator
8 on the case, and I think the defendants had shared the expense
9 of that investigator. He found out by going to the
10 premises and talking to the clerk, as I remember it --
11

12 Q You remember the hotel clerk?

13 A The hotel clerk, that there was some disturbance,
14 that there was some damage done, I believe to the door which
15 adjoined or which was adjacent rather to the door where the
16 three defendants were found in; that he had given the
17 police officers a pass key. Also I knew that -- I expected
18 Doyle to testify that there was no consent.

19 Q At any time prior to the trial of Mr. Lipuma's
20 case did you believe the motion to suppress to be frivolous?

21 A Absolutely not.

22 Q Did you ever form an intention to abandon that
23 motion?

24 A Absolutely not.

25 Q Did you consider it crucial to his defense to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr Quagliata-direct
pursue that motion?

54

A Yes.

Q Is it not a fact, sir, that at least three counts of the indictment were predicated exclusively on evidence seized pursuant to that search?

A I don't remember the indictment but I know that a lot of the counts in it had to do with possession of property that was taken pursuant to a burglary.

Q Was there ever any strategic decision made by yourself or anyone in your professional association not to pursue that motion to suppress for any reason?

A Absolutely not.

Q Now, in fact had you told the defendant that such a motion had been made in his behalf?

A Yes. You see, after Judge Leff got the case, the case then went to Judge Roberts, and this I do remember was at a bench conference between -- I know I was there and I don't know who else was there, but we were talking about a timetable as to whether or not he would try the case or farm it out to another judge because most of the cases that go to Part 42 in Manhattan eventually go to trial in another courtroom. I did mention that the case wouldn't be two or three days, it would be some time, because prior to the trial of that case there would be two

1
2 hearings. And that was about not too long prior to Judge
3 Frayman getting the case and eventually trying it.

4 Q When you say Judge Roberts in Part 42, which
5 Judge Roberts do you mean?

6 A Burton Roberts.

7 Q Was the matter transferred to Judge Roberts
8 shortly before May of 1974, that being the point of commence-
9 ment of the trial on Lipuma?

10 A I remember we made a few appearances before
11 Judge Roberts.

12 Q Now, you indicated that your responsibility
13 in your professional association was the preparation of
14 the pretrial motions.

15 A Yes.

16 Q Were you actually present in court when Mr.
17 Lipuma's trial commenced?

18 A I was not.

19 Q Were you present for the jury selection?

20 A No, ma'am.

21 Q Or any of the proceedings immediately antecedent
22 thereto?

23 A No, I was not.

24 Q Were you present during the hearing on the Wade
25 motion?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Quagliata-direct

56

A No, ma'am.

Q When for the first time did you learn that there had been no hearing on the motion to suppress physical evidence?

A After the trial had begun. I had a conversation with Mr. Coiro and in that conversation I learned that there was no motion to suppress. I think that's the night before I appeared in court, and I refreshed my recollection, and I think that was May 3rd of 1974. At that time I knew there was a problem. I made a statement before Judge Fryman. I ran up to the court reporter's room. I waited for each of the different reporters to get the minutes. I read the minutes -- they weren't transcribed but they read them right off the paper, and I was unsuccessful in proving my conversations wherein I did join in the motions were put on the record.

Q Now, at any time did Mr. Lipuma say anything to you or in any other way evidence his desire to abandon that motion to suppress?

A Absolutely no.

MRS. ROSNER: I have no other questions, your Honor.

MRS. BAYER: No questions, your Honor.

THE COURT: Thank you.

1 rdb

Coiro-direct

57

2 (Witness excused.)

3 M I C H A E L F. C O I R O, called as a witness
4 on behalf of the petitioner, after having been
5 duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MRS. ROSNER:

8 Q Good afternoon, Mr. Coiro.

9 A Good afternoon.

10 Q What is your profession?

11 A I am an attorney at law.

12 Q How long have you been?

13 A I was admitted on October 19, 1955.

14 Q And in 1972 were you practicing law?

15 A I was.

16 Q Did you have a specialty at that time?

17 A My specialty has always been criminal law.

18 Q Has always been what?

19 A Criminal law.

20 Q Now, in 1972, did you have a professional
21 association?

22 A I did.

23 Q And who was that with?

24 A With Mr. Quagliata, Salvatore Quagliata.

25 Q During 1972 did your firm commence the repre-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr Coiro-direct

58

sentation of Mr. Thomas Lipuma?

A We did.

Q Tell the Court briefly the circumstances under which that occurred, what the nature of the proceeds were and what stage they were at when you first became acquainted with Mr. Lipuma.

A Mr. Lipuma first came to my office -- I am not sure of the exact time, but either five or six months after he had been indicted. He came to my office. We discussed the fact as to whether or not I would represent him. After speaking with Mr. Lipuma I did undertake the defense of the indictment that was pending against again.

Q Now, at that time had any other attorney been representing Mr. Lipuma?

A As far as I know the only other attorney that had been in the case was Mr. Lawrence Hochheiser and I think a conflict -- well, Mr. Lipuma felt in his own mind there shouldn't be one attorney representing two defendants.

Q Did Mr. Hochheiser turn over to your firm any memoranda, court papers or anything else in the nature of a file that had been developed on Mr. Lipuma's behalf?

A No. I think the only thing I got was Mr. Lipuma brought me a copy of the idnictment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdb

Coiro-direct

59

Q Now, did you have conversations with Mr. Lipuma concerning the defense of his case?

A I did.

Q And did you in effect debrief him on the facts?

A I certainly did.

Q Did you debrief him on the circumstances surrounding his arrest -- the circumstances surrounding his arrest?

A I did.

Q And can you recite briefly the facts that he told you as they related to a possible motion to suppress physical evidence?

A Well, Mr. Lipuma had indicated to me that at the time of this arrest he had been on parole, that he had received an invitation -- I forget from which of the two defendants -- to go to this particular hotel room, that he did go there; that while he was in the room there was a disturbance and in fact a knock on the door saying "Police." At that point Mr. Lapuma told me he said "What's going on? I am on parole. I don't understand what this is all about."

One of the defendants said to him, "Quick, hide, get in the closet, maybe I can get rid of him."

Thomas was concerned because he was on parole and he hid in the closet. The police came in, searched

the apartment, said they found furs, jewelry, some other items and that they took him out of the closet.

Q Did you discuss with him whether there was any contraband or property in open view on a bed in the room?

A I did.

Q What did he say?

A Mr. Lipuma said when he walked into the room there was nothing on any of the beds. Just the two individuals were there and they were talking.

Q Did you discuss with him whether anyone consented to the entry into that hotel room?

A I did, and he told me that as far as he knew nobody had consented to allow anybody into the room; that the police had burst in.

Q In your opinion was there a viable motion to suppress physical evidence to be made in his behalf?

A Yes, there was, Mrs. Rosner.

Q To your knowledge did your firm ever file any formal motion papers seeking suppression of evidence?

A No, we did not file formal motion papers.

Q To your knowledge did anyone on the record join in Mr. Hochheiser's motion to suppress physical evidence?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbbr

Coiro-direct

61

A My partner, Mr. Quagliata, told me that he had joined in the motion to suppress on the record.

Q Were you present on the occasion when Mr. Quagliata said that this was done?

A No, I was not present in court on that day.

Q So I take it your knowledge of that fact was predicated on your belief in that fact was predicated on what Mr. Quagliata had told you?

A My partner told it to me; I believed him.

Q Did there come a time when you discussed with Mr. Lipuma where those motions had been made; that is, a motion to suppress physical evidence?

A Yes, there did, Mrs. Rosner. I joined my partner, Mr. Quagliata, and Mr. Lipuma over in 100 Centre Street. I made very few appearances prior to the actual trial, but I did join Mr. Quagliata and Mr. Lipuma on one occasion because I happened to be in the Southern District. I appeared in this building. I walked over, met with them. I remember the incident because we went to Vincent's to eat, and it is at that point that Mr. Lipuma said "Well, what about my motion to suppress and my identification hearing?"

I said "The motions have been made. The motions have been made. It is just a question of getting

everybody together so we can have the hearing and we will go from there."

Q Did Mr. Lipuma ever, by word or any other conduct, evidence an intention to you to abandon his right to make those motions?

A No, he did not. In fact he was insistent upon the fact he wanted them made.

Q Did there ever come a time when you or anyone in your professional association formed a brief that the motion to suppress physical evidence was frivolous and should not be made?

A No. To the contrary, both my associate, Mr. Quagliata, and I were in accord that the motion -- we thought it was a valid motion.

Q Now, was a hearing on the motion to suppress physical evidence conducted prior to trial?

A No, it was not.

Q Did you make any request for a hearing prior to trial?

A You know, that is a problem, Mrs. Rosner, that I can only -- I have to answer it as honestly as I know how. I made a motion to suppress -- I had a hearing on the motion to suppress the identification, and believe me, I just can't say to you, unless it was just an oversight

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbr

Coiro-direct

63

on my part, that I didn't ask for the hearing prior to trial.

I made a mistake. I said that to Judge Frayman. I told him I made a mistake and if I had made a mistake, to blame me, not to hold it against my client.

I think I spread it on the record as best as I could. If he felt I even should be censored by the Appellate Division, I told him to send me to the Appellate Division but there was no reason for my client to suffer because of a mistake I made.

MRS. ROSNER: No other questions, your Honor.

CROSS EXAMINATION

BY MRS. BAYER:

Q Mr. Coiro, you previously just now testified that you indicated to Judge Frayman on his inquiry that you had made a mistake, it was your mistake that the motion had not been made.

A I don't know your name, ma'am.

Q Miss Bayer.

A Miss Bayer, I made that statement to Judge Frayman during the course of the trial. I had asked him to please conduct -- to allow me to conduct a motion to suppress during the course of the trial and Judge Frayman had said to me that the case had been rather old, I had ample time to make

1 the formal motion.

2 That is when I told him we joined in it on
3 the record and we tried to locate the record but we couldn't.
4 He said no, that he was going to disallow it.
5

6 That's when I said to him "Judge Frayman,
7 if I made a mistake, take it out on me."

8 Q Did Judge Frayman during that colloquy ask
9 you why at the beginning of trial you had only indicated to
10 him that a motion to suppress the identification was
11 outstanding?

12 A Yes. I believe, Mrs. Bayer, I had said to him
13 that when I looked in my file I didn't see any formal
14 papers as to a motion to suppress because I remember Judge
15 Frayman saying "I don't see any papers, I don't see any
16 papers."

17 At that point I had forgotten -- I am a pretty
18 busy trial lawyer, on trial most of the time, I had forgotten
19 what Mr. Quagliata had told me that he joined in the motion
20 orally before one of the judges. In fact when I spoke to
21 Mr. Quagliata he told me about it and I was sure
22 Judge Frayman would give it to me during the course of the
23 trial.

24 Q Is it not in fact true that at that point
25 you represented to Judge Frayman that after looking at your

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdb

Coiro-cross

65

file you had felt that all you were entitled to was a motion to suppress the identification and that in fact the motion to suppress the physical evidence did not become important in your mind until after the testimony had developed during trial, specifically the testimony of Patrolman Powers?

A That is absolutely --

MRS. ROSNER: Objection to form. If Miss Bayer has a prior inconsistent statement and she desires to impeach the witness with it I wish she would do it verbatim instead of summarizing.

THE COURT: This is cross and I will permit it.

A Miss Bayer, actually what you say is actually true, but it was because I didn't find the actual papers in there. Judge Frayman kept saying to me "That's it." Then when I did hear the patrolman testify, I think at that point on the record I asked Judge Frayman to consider it as a motion to suppress, and he said he wouldn't.

THE COURT: To consider what as a motion to suppress?

THE WITNESS: In other words, Judge Conner, as the police officer testified I wanted a separate ruling from Judge Frayman because under our statute, the penal statute, you're entitled to a motion to suppress either

before trial or during the trial, but as to the fact of having it during the trial it is solely within the judge's discretion.

MRS. BAYER: Thank you very much.

MRS. ROSNER: Very brief redirect.

REDIRECT EXAMINATION

BY MRS. ROSNER:

Q During the preparation of Mr. Lipuma's case for trial he went to the expense of hiring an investigator?

A Yes, he did.

Q That investigator was hired to locate individuals who rented the room next to the room he was arrested in?

A That is correct, Mrs. Rosner.

Q Wasn't that for the purpose of establishing that the door had been broken down by the police in a forcible entry of a room next door?

A Yes.

Q And wasn't that evidence designed to be used on the motion to suppress to show no consent to enter?

A It was.

Q Were you aware of those things, Mr. Coiro?

A I was.

Q Pretrial?

A Pretrial.

2 MRS. ROSNER: No other questions.

3 THE COURT: And those investigators were hired
4 by or on behalf of Mr. Lipuma?

5 THE WITNESS: On behalf of Mr. Lipuma and the other
6 two defendants.

7 THE COURT: They were sharing the costs?

8 THE WITNESS: Yes, because they felt it was
9 common as to all three.

10 THE COURT: All right.

11 Anything else?

12 MRS. ROSNER: No, your Honor.

13 THE COURT: Thank you, sir.

14 (Witness excused.)

15 MRS. ROSNER: I rest on the motion, your Honor.

16 THE COURT: Does the respondent have any
17 further evidence?

18 MRS. BAYER: No, your Honor.

19 THE COURT: Now, do you want to make any final
20 arguments or summations? Do you want to file post hearing
21 memoranda or do you want the Court merely to take the matter
22 under advisement on the papers that are already on file
23 plus the record of this hearing?

24 MRS. BAYER: I would personally appreciate the
25 opportunity to file a post-trial memorandum.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

rdbbr

68

THE COURT: How long would you require for that?

MR. BAYER: How long will it take to get the minutes?

(Discussion off the record.)

THE COURT: I suppose the petitioner having the burden of proof has the right to open and close on the briefing, if you want that right.

MRS. ROSNER: I would be prepared to rest on the proceedings had thus forth and the memoranda submitted. If Miss Bayer feels there are some points she would want to address I would prefer to wait for her position.

THE COURT: How long do you say?

MRS. BAYER: 10 dayd delivery of the transcript and then a week after.

THE COURT: You may have a week thereafter.

MRS. ROSNER: Would you consider an application for bail which you have the power to grant? The defendant has been incarcerated now in connection with this specific indictment. It is two years of a five-year sentence, your Honor, and in --

THE COURT: I am not at all sure I have the right to do that.

MRS. ROSNER: You certainly do. In re Wainright,

5th Circuit, 1975, Marsh V. Johnson, 3rd Circuit, 1970 and a host of other cases, your Honor. The Federal District Court has power to bail a state court prisoner. in re Wainright is just a few months old, 5th Circuit.

THE COURT: What are the bail conditions at the present time?

MRS. ROSNER: He is at liberty and remanded on this conviction. He is doing the time on this case. He is actually only incarcerated because of this conviction, your Honor, and during the entire proceedings in the state court he was at liberty on bail. There is absolutely no threat of fugivity.

THE COURT: Do the cases you cite apply to a situation like this where he is not merely being held on a state charge but doing time on a state conviction?

MRS. ROSNER: Yes. In re Wainright is just such a case. I have it in mind because it is in the advanced sheets recently. 5th Circuit 75 but there are other cases. Epten v. Nenna, Judge Frankel in this courthouse granting bail to William Epten on a state court conviction.

THE COURT: Let me say that I am not disposed to set bail at this time. We are only talking about a couple of more weeks. While I realize that even an extra day of unnecessary incarceration is an extreme disadvantage,

2 I am not disposed at this time to set bail.

3 MRS. ROSNER: May I ask this, Judge: The
4 petitioner has a very serious heart condition which is amply
5 reflected in his file in prison. I would ask the Court
6 to look at the cases I cited and reconsider the application
7 because there has never been a threat of fugitivity. He
8 is actually serving a sentence and the testimony here, I
9 think, supports the claim we have been making all along,
10 that it was sheer neglect of counsel and the ineffect of assist
11 ance of counsel that caused a very serious determinative
12 right of his to be lost to him.

13 I would ask the Court to look at the case and if
14 you are convinced, as I represent to the Court do hold that
15 you have the power to do this, may we then be heard on the
16 bail question, Judge?

17 THE COURT: I will give the matter some consider-
18 ation. As they say, don't call me, I will call you.

19 MRS. ROSNER: I would like to give you the cases
20 because you do have the power and I think it is a
21 proper case for the exercise of that power.

22 THE COURT: I am not at all sure of that.
23 I don't want to indicate my thinking on the merits of the
24 present petition but as you know the Second Circuit standard
25 of incompetence is a low standard, or stated another way,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

71

rdb
standard for grant of a writ of habeas corpus based on
incompetence is a very, very high standard. In this
case it was an instance of forgetfulness. When the time
for the trial arrived counsel pressed the motion for a Wade
hearing but forgot that there had been a motion to suppress
the evidence obtained in the search of the hotel room and
did not press at that time for a hearing on that motion.

I query whether mere forgetfulness meets that
standard in this circuit.

MRS. ROSNER: I think it does because of another
factor in the case. They didn't merely forget to make it,
they misadvised, misrepresented to the client that something
had been done to protect his rights.

THE COURT: As the time for trial approached they
could still have made the motion at any time up to the
actual start of trial. Even conceding that they were
under the impression that they had stated on the record
that they were joining in the motion of the co-defendant
to suppress and believed that they would get the benefit
of that motion, they still forgot to press for the hearing
before trial and it was not a matter of incompetence as
much as it was plain forgetfulness.

MRS. ROSNER: That is incompetence when
you have a man's freedom on your hands, Judge.

1
2 THE COURT: That will be the issue I will
3 have to determine after a thorough study of the authorities
4 you have cited on both sides.

5 I will give some consideration to the cases.

6 As soon as you get the transcript, if you will
7 send me a copy so I can get a copy of his cases.

8 MRS. ROSNER: I have the cases in mind.
9 There is a new case on the failure to make a motion to
10 suppress as being incompetence of counsel, Wainright
11 v. Sykes, 5th Circuit, '75. I don't know if it has an advance
12 citation because I picked it up in the Criminal Law Reporter
13 but I will attempt to get the citation for your Honor.

14 THE COURT: Thank you.

15 - - -
16
17
18
19
20
21
22
23
24
25

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Lawrence Hochheiser	3	30		
Salvatore F. Quagliata	39			
Michael F. Coiro	57	63	66	

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for respondents-appellants herein. On the 28th day of February, 1977, he served the annexed upon the following named person :

Nancy Rosner
401 Broadway
NY NY

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Sworn to before me this
28th day of February, 1977

Kenneth McKay
Assistant Attorney General
of the State of New York

Ralph McMurry